DOCUMENT RESUME

ED 459 503 CS 510 721

TITLE	Proceedings of the Annual Meeting of the Association for Education in Journalism and Mass Communication (84th, Washington, DC, August 5-8, 2001). Law Division.
INSTITUTION	Association for Education in Journalism and Mass Communication.
PUB DATE	2001-08-00
NOTE	190p.; For other sections of the 2001 proceedings, see CS 510 704-724.
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	MF01/PC08 Plus Postage.
DESCRIPTORS	*Confidentiality; *Court Litigation; Disclosure; Higher Education; *Internet; *Journalism Education; *Legal Problems; News Writing
IDENTIFIERS	*Communications Decency Act 1996; *Public Interest

ABSTRACT

The Law section of the proceedings contains the following 6 selected papers: "Is the Public Interest Meaningless? Levels of Meaning and Ambiguity in the Public Interest Standard" (Philip M. Napoli); "An 'Unholy Alliance': The Law of Media Ride-Alongs" (Karen M. Markin); "Is Internet Service Provider Immunity Growing? An Examination of Immunity under #230 of the Communications Decency Act after 'Zeran'" (Elizabeth Spainhour); "The Effects of 'Desnick v. ABC': Creating Boundaries for Surreptitious Newsgathering" (James V. D'Aleo); "Updating SPJ's Report on the Journalist's Privilege: Three Years Later, Is the Privilege Truly Eroding?" (Anthony L. Fargo); and "The Journalist's Privilege for Nonconfidential Information in States without Shield Laws" (Anthony L. Fargo). (RS)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 459 503

Proceedings of the Annual Meeting of the Association for Education in Journalism and Mass Communication (84th, Washington, DC, August 5-8, 2001): Law Division.

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY

J. McGill

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

1

BEST COPY AVAILABLE

CS 510 721

Is the Public Interest Meaningless?:
Levels of Meaning and Ambiguity in the Public Interest Standard

Philip M. Napoli
Graduate School of Business Administration
Fordham University
113 W. 60th St.
New York, NY 10023
pnapoli@fordham.edu
212-636-6196

Presented to the Law Division of the Association for Education in Journalism & Mass Communication

Is the Public Interest Meaningless?:
Levels of Meaning and Ambiguity in the Public Interest Standard

Abstract

In light of recent statements by new FCC Chairman Michael Powell that the public interest standard in communications regulation is essentially meaningless, this paper revisits the long-running debate over the meaning -- or lack thereof -- of the public interest standard. This paper argues that the question of the meaning of the public interest standard actually contains three separate tiers of the analysis, as the public interest concept can be broken down into three separate levels of meaning: (a) the conceptual level; (b) the operational level; and (c) the applicational level. This paper illustrates that much of the ambiguity and inconsistency associated with the public interest standard resides within the operational and applicational levels. This paper then pinpoints the specific sources of ambiguity and inconsistency and suggests means by which greater definitional specificity and consistency can be brought to the public interest standard.

Is the Public Interest Meaningless?: Levels of Meaning and Ambiguity in the Public Interest Standard

In a February, 2001 press conference, newly appointed FCC Chairman Michael Powell was asked how he would define the "public interest" standard that has long been at the center of communications regulation (see Communications Act of 1934). Powell's answer: "I have no idea" (Powell, 2001). Powell went on to say that the public interest standard has traditionally served as an "empty vessel" into which preconceived views can be poured (Powell, 2001). He also stated that the meaning of the public interest standard is something that "nobody wants to debate or talk about" (Powell, 2001). With these comments, Chairman Powell has reignited the debate that has been long-running in academic circles (see Rowland, 1997a, 1997b; Mayton, 1989; Sophos, 1990) – if not (according to Powell) amongst policymakers – regarding whether the public interest concept does indeed have any concrete meaning in communications regulation and policy.

Central to this debate has been the long-standing criticism that the public interest standard is ambiguous to the point of meaninglessness. As was argued as far back as 1930 (after the drafting of the Radio Act of 1927), "'the public interest, convenience or necessity' means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority" (Caldwelll, 1930, p. 296). Such arguments have persisted throughout the history of communications regulation (see Krattenmaker & Powe, 1994; National Broadcasting Company, Inc., v. United States, 1943; Robinson, 1989), up to the present, with Powell's (2001) recent statements on the subject.

This paper argues that the question of the meaning – or lack thereof – of the public interest standard is actually a multi-tiered question. That is, there are multiple levels to the public interest concept. Each of these levels represents a different dimension of the public interest and is associated with a different set of questions that policymakers and policy analysts must answer. Any debate or discussion surrounding the meaning of the public interest must first establish which level of this complex concept is under consideration. Only when the appropriate level of analysis has been established can any productive debate over the meaning of the public interest terminology proceed. Questions of ambiguity or inconsistency in interpretation can exist at any of the three levels. However, debates, discussions, and investigations of the meaning of the public interest terminology will enhance the term's usefulness only if the parties involved clearly establish which level of the term is being subjected to debate or analysis. The organizational scheme provided here, in which the public interest standard is broken down into its conceptual, operational, and applicational levels, is intended to help provide such focus for future debates.

This paper also illustrates how breaking the public interest down in this way facilitates identifying the specific areas of ambiguity that continue to plague this policy principle. As this analysis will illustrate, the ambiguity of the public interest standard is primarily operational and applicational in nature. At the operational level, the individual values or principles that comprise the operational definition of the public interest frequently have been expressed, but never have been adequately defined. Moreover, policymakers have failed to establish a stable and concrete hierarchy of values amongst the various policy principles that comprise the operational level of the public interest.

At the applicational level, the main problem has been one of failing to explicitly articulate

the standards that comprise service in the public interest or the fulfillment of specific policy principles. Thus, for example, policymakers seldom have clearly articulated what constitutes broadcaster fulfillment of their public interest obligations. Nor have they often clearly articulated the criteria for the assessment of the effectiveness of their policies. By identifying the various levels of the public interest, and pinpointing the specific areas of ambiguity and inconsistency that exist, it is hoped that this analysis will facilitate more focused and directed efforts at alleviating the ambiguity that has long plagued the public interest standard.

Levels of the Public Interest

The public interest concept is not exclusive to communications regulation. Consequently, there is a long history of analysis of the concept among political scientists and political philosophers, little of which, however, ever has been integrated into the definitional debates that have taken place within the communications policy field. These analyses, which provide the framework for this discussion, have generally identified three distinct levels of the public interest concept. These levels, and their associated central questions, are diagramed in Figure One. The first of these levels is the conceptual level. At this level (the broadest of the three), the debate revolves around the general meaning behind the phrase in terms of how public interest determinations are made. The fundamental question at this level of analysis is: How should an institution charged with serving the public interest make its public interest determinations?

The second level is the operational level. This is the level at which specific values or principles are associated with serving the public interest. That is, this is the level at which the specific objectives to be pursued are defined. This level has been associated with identifying "indicators that we may use to determine empirically whether something is in the public interest"

(Mitnick, 1976, p. 5). Of course, the specific values or principles grow out of the particular conceptualization reached at the first level, as well as out of the particular regulatory context in which the term is being applied. In this paper, the focus will obviously be on how the public interest concept has been operationalized in communications regulation.

The third level is the applicational level. This is the level at which the particular values and principles delineated at the operational level are translated into specific policy decisions or regulatory standards. Thus, the relationship between the operational and the applicational levels can be thought of as analogous to the relationship between strategy and tactics. At the strategic level, a general plan of action is formulated, with general guidelines formulated. At the tactical level, these guidelines are translated into specific actions. However, as one analyst of the public interest concept noted, "even though a great many people may agree on general principles, there is almost sure to be a wide variety of views concerning how to apply those principles to concrete situations" (Downs, 1962, p. 7). This statement highlights the fact that debates or criticisms of the public interest standard can take place on multiple levels.

INSERT FIGURE 1 HERE

Applying this three-tiered analytical framework to the specific context of communications regulation makes it possible to identify exactly where the ambiguity in the public interest standard lies (i.e., where the central questions have gone unanswered or incompletely answered). As the sections that follow will illustrate, although there traditionally has been very little ambiguity or inconsistency at the conceptual level, the operational and applicational levels exhibit the ambiguity

and inconsistency that fuel the criticisms that the public interest standard is essentially meaningless

The Public Interest at the Conceptual Level

The conceptual level is the most abstract level at which the meaning of the public interest is debated and discussed. Consequently, discussions of this level of the public interest are not particularly common within the communications policy arena (for exceptions, see McQuail, 1992; Ramberg, 1986). Rather, this level has received the most attention from political scientists seeking to determine whether the public interest concept contains any explanatory power for political behavior (e.g., Cochran, 1974; Mitnick, 1976; Schubert, 1960) and political philosophers who are typically more concerned with exploring conceptual boundaries and achieving greater conceptual clarification (e.g., Benditt, 1973; Friedrich, 1962) and less concerned than political scientists with the concept's utility as a predictive tool.

Researchers have identified as many as ten different articulations of the public interest at the conceptual level (see Ramberg, 1986), suggesting the potential for an enormous amount of inconsistency in terms of how this dimension of the public interest is defined by policymakers. For the purposes of this analysis, these conceptualizations are compressed into the following three categories: (a) majoritarian conceptualizations, (b) procedural conceptualizations, and (c) unitary conceptualizations.[1] The key point of this discussion is that, despite these different interpretive approaches, at the conceptual level communications policymakers have, for the most part, consistently adhered to the unitary conceptualization of the public interest standard. Consequently, there is no significant problem of ambiguity or inconsistency at this level of the public interest.

Majoritarian conceptualizations refer to the notion of reaching public interest

determinations via the aggregation of individual interests, such that majority rule determines which policy options are indeed in the public interest. This conceptualization of the public interest (similar to Held's [1970] "preponderance" approach), places the regulator in the position of interpreter of community policy preferences, who must then translate these preferences into effective policies (Box, 1992). This conceptualization of the public interest appeared prominent in the earliest days of communications regulation. During the first year of the Federal Radio Commission, Commissioner Henry Bellows proclaimed, "We can only do what you tell us you want done" (Baughman, 1985, p. 4), reflecting the degree to which public input was expected to guide regulatory behavior. However, research indicates that the majority of the public is largely uninterested and uninformed regarding matters of communications policy, and consequently seldom participates in the policymaking process, leaving industry groups as the primary source of input on policy matters (Kim, 1992; McGregor, 1986). In addition, a growing body of research shows that, even when the public does participate in the policymaking process, their input seldom has any influence over decision making (Holman & McGregor, 2001; Kim, 1995; McGregor, 1986). Thus, while a majoritarian approach to making public interest determinations may be desirable, the reality of the situation is that this conceptualization of the public interest has not been integrated into communications policymaking.

Nor have communications policymakers employed a procedural conceptualization. Procedural conceptualizations involve defining the public interest exclusively in terms of the process by which decisions are reached (e.g., Herring, 1936) and the outcomes reached through such a process (see Ramberg, 1986). The logic of this interpretation is well-illustrated by an early analysis of the communications policymaking process, which concluded that "The only realistic

definition of the significance of 'public interest, convenience, or necessity' . . . is the sum total of the policies that have been applied by the Federal Radio Commission and the Federal Communications Commission" (Edelman, 1950, p. 30) -- a definition that clearly suggests that the actions of the FCC, whatever they may be, themselves define the public interest.

Obviously, this results-focused conceptualization suffers as a guide for policymakers from the fact that the public interest is reduced to a value-free label applied to whatever decisions emerge from the policymaking process. Consequently, the notion of the public interest is "no longer a guide to policy-making, but a post hoc label for the product of their strivings. Since it does not exist until after the group struggle is lost and won, it can provide no benchmark for policy formation" (Sorauf, 1957, p. 630, emphasis in original). For this reason, a procedural conceptualization of the public interest has never been (and can never be) prominent in communications policymaking. From a policymakers' standpoint, the public interest must be conceptualized in a way that provides justifications for specific policies and criteria for their assessment (Barth, 1992, pp. 291-292; see also Lasswell, 1962).

Such justifications and criteria can be developed via a unitary conceptualization of the public interest, which has been the predominant conceptualization in communications policymaking. Unitary conceptualizations approach the public interest as a unitary, coherent scheme of values or principles (Held, 1970). Many theorists who have addressed the public interest concept define it within the context of a body of substantive principles "that provide substantive guidance to the proper content of public policy" (Flathman, 1966, p. 53; see also Goodin, 1996). Mitnick (1976) identifies this conceptual category as a "set of preferences" that "reflect persisting and ultimate values" (p. 15).

This is the conceptualization that has traditionally dominated communications policymaking. As the following section will demonstrate, even when communications regulators have differed substantially on the meaning of the public interest, these differences in interpretation have existed at the operational and applicational levels, not at the conceptual level. In fact, calls to redefine the public interest in communications regulation have virtually never addressed the conceptual level. They have instead assumed a unitary conceptualization and focused their arguments on the remaining two interpretive levels, addressing issues such as the appropriate policy principles/objectives (the operational level), or the appropriate means to pursue these objectives (the applicational level).

Of course, for this unitary conceptualization of the public interest to be effective, policymakers must infuse the public interest concept with specific principles that are "anchored in widely shared value assumptions" (Bailey, 1962, p. 97). This is where the a major failing of this conceptualization of the public interest has taken place. It has long been recognized that policymakers have failed to enunciate "consistent, clear, and positive criteria as to what is in the public interest, convenience, or necessity" (Herring, 1936, p. 173; see also Price, 1995, pp. 162-163). It is important to recognize that these critiques, by the very substance of their argument, acknowledge that, at the conceptual level, the public interest has been effectively defined. Specifically, it has been defined as a set of guiding principles, as opposed to other interpretive options, such as the majoritarian or procedural interpretations.

Consequently, it is safe to say that, at the conceptual level, a consensus has been reached in favor of a unitary interpretation of the public interest in communications policymaking. Thus, any criticisms of ambiguity, inconsistency, or meaninglessness of the public interest in

communications policymaking at the conceptual level would be inaccurate. At this broadest level of the public interest standard, a coherent and stable consensus definition has been reached. The problem, however, as suggested by the critiques noted above, is that the relevant guiding principles have not been effectively enunciated.

The Public Interest at the Operational Level

As the previous section argued, within the context of communications regulation, the public interest has been conceptualized according to the unitary definition, in which decisions are made according to a specific set of guiding principles. It is within this context of adopting and adhering to a set of guiding principles – essentially operationalizing the public interest – that much of the ambiguity and inconsistency associated with the public interest standard exist.

During the 70-plus year history of the FCC and the FRC, different sets of guiding principles have been articulated. This history of inconsistency has contributed to the perception of meaninglessness associated with this dimension of the public interest standard. As Krasnow and Goodman (1998) point out, "Disputes concerning legal prescriptions imposed by the Communications Act often have centered on recurring value conflicts" (p. 626). The extent of these value conflicts help illustrate the range of interpretations that have been employed at this level of the public interest. Consider first the well-known "marketplace" approach to the public interest typically associated with Reagan-era FCC Chairman Mark Fowler and echoed in the recent statements by new FCC Chairman Michael Powell (see Powell, 2001). According to the marketplace approach:

> Communications policy should be directed toward maximizing the services the public desires. Instead of defining public demand and specifying categories of programming to

> serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public's interest, then, defines the public interest. (Fowler & Brenner, 1982, pp. 3-4)

Clearly, the guiding principles underlying this operationalization of the public interest are market forces and consumer sovereignty.

Some might argue that the "marketplace" interpretation is directed at the conceptual level, as opposed to the operational level, and as such it reflects a majoritarian conceptualization of the public interest, as opposed to a unitary conceptualization (e.g., McQuail, 1992). However, such an interpretation mischaracterizes the essence of the marketplace approach, as it confuses policy outputs with industry outputs. For the marketplace approach to reflect a majoritarian interpretation of the public interest at the conceptual level, it would have to advocate a greater reliance upon the policy preferences of the citizenry in the policymaking process, and an emphasis on majority rule in determining the ultimate decision outcomes. This is not what Fowler and Brenner (1982) are arguing for. A close reading of their article clearly indicates that they are not concerned with altering the way in which policy decisions are reached. Rather, they are arguing for an emphasis on marketplace forces and consumer sovereignty as the guiding principles for communications policymakers. Under such guiding principles, consumers may indeed have greater influence over the products and services available to them (or, at the very least, the government will have less influence); however, they will not have a greater say in the policy decisions made by the Commission. Thus, the marketplace approach's emphasis that the "public's interest . . . defines the public interest" (Fowler & Brenner, 1982, pp. 3-4) is largely an operational-level interpretation, in that the majority's role and function has changed only to the

degree that the specific guiding principles have provided for less government interference in the relationship between media producers and consumers.

Similarly, it could be argued that the essence of the marketplace approach is directed primarily at the applicational level. That is, the emphasis on consumer sovereignty and reliance on market forces can (and often has been) construed as simply the most effective means (i.e., applicational approach) of achieving broader policy principles such as diversity and a robust marketplace of ideas. Indeed, this is sometimes the case. In some instances, advocates of the marketplace approach assert that reliance on market forces and prioritizing consumer sovereignty are the most effective means to achieving other normative goals frequently associated with the public interest standard. Polic and Gandy (1991) summarize this argument within the specific context of achieving a robust marketplace of ideas: ". . . a marketplace, unconstrained by regulation, by the very nature of its economically lawful operation -- that is, its sensitivity to citizens/consumers' demand and competitive supply -- will provide a 'multiplicity of tongues', and thus, in the long run, better approximate the ultimate goal in democracy -- the 'multiplicity of ideas'"(p. 56; see also Smith, 1989).

However, not all advocates of the marketplace approach make this strong causal claim. Instead, they argue that maximizing consumer sovereignty and unleashing market forces to their fullest, in and of themselves, satisfy the normative dimension of the public interest concept (e.g., Owen, 1975), regardless of the positive or negative effects of such an approach on normative criteria associated with other operationalizations of the public interest. Again, a close reading of Fowler and Brenner (1982) indicates that the shift in regulatory philosophy they advocate will enhance consumer satisfaction and that only consumer satisfaction need be equated with the

public interest. At no point do Fowler and Brenner (1982) suggest that the marketplace approach will better fulfill the social and political objectives characteristic of the "public trustee" approach (see below). Rather, they argue that these were inappropriate regulatory objectives for the FCC to pursue in the first place (see Fowler & Brenner, 1982, p. 4). In fact, Fowler and Brenner (1982) acknowledge in the final portion of their article that the marketplace approach would likely result in gaps in the provision of certain types of socially valuable programming.[2] Similar points can be found in the more recent Powell incarnation of this regulatory perspective, in which the new Chairman argues that policies addressing political or moral issues should be handled by Congress, not the FCC (Powell, 2001). The key point here is that it is essential to distinguish between the marketplace approach as the means to other ends (applicational) and the marketplace approach as a set of principles that are, themselves, the particular ends worth pursuing. The distinction here is an important one, as it reflects the fact that there are two different levels (operational and applicational) to the marketplace approach to the public interest standard.

This distinction is also important in that it reinforces the fact that differing interpretations of the meaning of the public interest have generally not taken place at the conceptual level. Even the trustee model, frequently held up as the antithesis of the marketplace approach, shares the same conceptual foundation. The differences between the two interpretations are exclusively operational and/or applicational. Consider then-FCC Chairman Newton Minow's famous expression of the "public trustee" interpretation and its stark contrast to the marketplace approach. As outlined in his "Vast Wasteland" speech (Minow, 1978), the trusteeship model emphasizes the imposition and enforcement of social responsibility obligations by the FCC. According to this perspective, audience preferences and market forces alone should not determine

the nature of media content and services, and are not assumed to lead to the fulfillment of social welfare objectives. Additional criteria established by the FCC must be met. As Minow (1978) told broadcasters, ". . . your obligations are not satisfied if you look only to popularity as a test of what to broadcast" (p. 212). Thus, according to this operationalization, consumer sovereignty and market forces do not provide the guiding principles for policymakers, but once again, the regulators themselves fulfill the central role of operationalizing a set of guiding principles.

Unfortunately, policymakers have seldom articulated the specific guiding principles to be utilized in decision making and policy assessment. We do see such an effort in a 1928 statement by the Federal Radio Commission. In this statement, the FRC identified "key principles which have demonstrated themselves in the course of the experience of the commission and which are applicable to the broadcasting band" (Federal Radio Commission, 1928, p. 59). These key principles included: (a) freedom of signal interference; (b) a fair distribution of different types of service; (c) localism; (d) diversity of program type; and (e) high levels of character and integrity on the part of broadcast licensees (Federal Radio Commission, 1928, pp. 59-61). This statement offers a set of guiding principles (localism, character, diversity) for communications regulators that varies significantly from the principles that are central to the marketplace approach, indicating the range of interpretations that have been possible at this definitional level.

Unfortunately, more recent expressions of the operational level of the public interest are difficult to locate. As are a result, researchers have taken to studying policymakers and the policymaking process in an effort to identify the guiding principles most central to the public interest standard. For instance, Krugman and Reid (1980) conducted interviews with FCC staffers and commissioners on the subject, finding that members of the FCC perceived the public

interest as a highly fluid term that "changes not only from issue to issue but with relationship to an issue in which a policy has already been established" (Krugman & Reid, 1980, p. 317). Underlying this fluidity, however, were five major constructs: (a) balance of opposing viewpoints; (b) heterogeneity of interests; (c) dynamism, in terms of technology, the economy, and the interests of stakeholders; (d) localism; and (e) diversity, in terms of programming, services, and ownership (Krugman & Reid, 1980). Other researchers have demonstrated how the FCC's operationalization of the public interest has evolved over time. For instance, Henning (1970) documents the beginnings of the Commission's incorporation of the principle of competition into the operationalization of the public interest standard in the 1950s (p. 425-426). According to Hirsch (1971), over the years the FCC has solidified its public interest mandate into three general policy objectives. These are: (a) that the public should have programming which best serves its needs and interests; (b) preventing the exercise of undue economic power; and (c) preventing undue control or influence over thought or opinion in the local, regional or national forum (Hirsch, 1971, pp. 16-17).

It is unfortunate that the specific principles inherent in the public interest concept have become something to be teased out of regulators and identified in a post hoc fashion by policy researchers. Instead, these principles should be forcefully articulated and appropriately documented. The absence of such clear and well-documented articulations of guiding policy principles represents an institutional failure on the part of Congress and the FCC to pull together the various values that have guided communications policymaking over the years into a coherent and meaningful statement of the fundamental principles that comprise the public interest.

As the above discussion suggests, these principles do in fact exist. Unfortunately,

policymakers have neglected to weave these values together into a coherent statement of the operational definition of the public interest, or to define these individual policy principles with any consistency or clarity. Terms such as diversity, universal service, and localism, which have long justified many of the FCC's policies, have long been poorly and inconsistently defined by policymakers (see Napoli, 2001). The ambiguity inherent in these guiding principles has thus infected the broader public interest concept. Absent stable definitions, different administrations can operationalize these principles in different ways, thereby undermining any sense of stability or clarity in regards to the operational level of the public interest standard.

Is, however, the identification and concrete definition of the central guiding principles enough to correct the operational ambiguity of the public interest standard? The fact that, as the above discussion suggests, the public interest concept possesses multiple dimensions raises the issue of an appropriate hierarchy of values. What happens if fulfilling the localism ideal conflicts with fulfilling the diversity ideal in a given situation or vice versa? What if enhancing competition undermines diversity? Is a decision that satisfies some ideals while undermining others still effectively serving the public interest? Does serving some ideals to the neglect of others potentially equate with better serving the public interest?

As yet, there is no agreed-upon hierarchy to the values implicitly associated with the public interest concept. Those instances in which multiple constructs associated with the public interest standard have been identified generally do not rank the constructs in terms of relative importance. Without an explicitly articulated hierarchy of values, nothing can be done to prevent one FCC administration from embracing competition to the neglect of other relevant policy principles while another embraces other principles, such as diversity or universal service, to the

neglect of competition. Such inconsistency in the prioritization of specific policy principles is an important reason behind the persistent criticisms of the public interest as meaningless and underlies why Chairman Powell (2001) sees the public interest as an "empty vessel" into which preconceived views can be poured.

Despite the work that needs to be done to bring the necessary clarity and stability to the operational level of the public interest standard, it is important to recognize that much of the work associated with this level has already been done. Guiding principles such as diversity, competition, localism, and universal service have become well-established in communications regulation (Napoli, 2001). As was intended when the public interest standard was adopted (see Price, 1995), policymakers have infused the concept with a particular set of values that reflect the unique problems and potential associated with the communications industries. Once these principles have been clearly defined, and once an appropriate hierarchy of values has been established, the residual ambiguity of the operational level of the public interest can be eliminated.

The Public Interest at the Applicational Level

At the applicational level, the principles articulated at the operational level are translated into specific policy actions or regulatory requirements. Thus, the applicational level of the public interest encompasses the specific policies promulgated by the FCC under its public interest mandate and the behaviors of those members of the regulated industries who are required to serve the public interest, convenience, and necessity. It is not surprising that ambiguity remains a problem at this level as well, given that applications of the public interest standard are direct outgrowths of how the principle is operationalized. Thus, the ambiguity at the operational level inevitably infects the applicational level.

Applicational ambiguity is well-illustrated by the criteria for what constitutes fulfillment of the public interest obligations of radio and television broadcasters. These criteria have changed repeatedly over the years (see Federal Communications Commission, 1999; National Telecommunications and Information Administration, 1997). Perhaps the two most well-known efforts by the FCC to establish specific performance criteria for broadcast licensees were the 1946 statement on the Public Service Responsibilities of Broadcast Licensees (commonly referred to as the Blue Book; see Federal Communications Commission, 1946) and the 1960 Programming Policy Statement. Both of these documents established general criteria for what constituted licensee performance in the public interest. The Blue Book emphasized four basic components: live local programs; public affairs programs; limits on advertising; and "sustaining" programs (defined as unsponsored network programs with experimental formats or appealing to niche audiences; see Federal Communications Commission, 1946). The 1960 Programming Policy Statement was much more extensive, outlining 14 "major elements usually necessary to the public interest" (Federal Communications Commission, 1960, p. 274). These included: the development and use of local talent; religious, children's educational, agricultural, news, and public affairs programming; editorializing by licensees; political broadcasts; weather and market services; and service to minority groups (Federal Communications Commission, 1960). Ideally, these concrete requirements represent outgrowths of specific policy principles such as localism and diversity.

With some exceptions (see ; Federal Communications Commission, 1976; 1996) policymakers have avoided mandating specific levels of service in these various areas, due primarily to First Amendment concerns. The lack of specificity in these requirements has, however, repeatedly drawn criticism (e.g., Cole & Oettinger, 1978; Minow & Lamay, 1995).

Consequently, policymakers frequently have investigated the possibility of quantifying the public interest obligations of broadcasters. Congress held hearings in the early 1980s in an effort to form legislation that quantified broadcasters' public interest responsibilities (Broadcast Regulation, 1983). Bills outlining plans for the FCC to allocate points for the type, quantity, cost, and placement of public service programming were proposed but not passed (Broadcasting Public Responsibility, 1981, 1983). Similar hearings were held in the early 90s (The Public Interest in Broadcasting, 1991). The issue resurfaced again in 1996 ("'We are going,'" 1996, p. 4), and, most recently in the FCC's Notice of Inquiry into the public interest obligations for digital broadcasters (Federal Communications Commission, 1999). In the case of children's television programming, the FCC (1996) eventually adopted specific programming requirements after acknowledging that "imprecision in defining the scope of a broadcaster's obligation under the Children's Television Act" of 1990 in its initial efforts to implement the Act did not effectively contribute to broadcasters' fulfillment of their public interest obligations (p. 10661; see also Kunkel, 1998).

Advocates of quantifying public interest obligations argue that such an approach will release broadcasters from what then-Chairman Reed Hundt described as the "whims of a particular FCC," ("'We are going,'" 1996, p. 4) and will make it easier for the Commission to justify those instances in which sanctions for failing to comply with the public interest are imposed on licensees (Hundt, 1996, pp. 1095-1096). Certainly, greater specificity in terms of the public interest requirements of broadcasters would help eliminate much of the ambiguity associated with this level of the public interest. The larger question, however (which extends beyond the scope of this paper), is whether such specificity can be achieved without violating the First Amendment. The fact that such criteria have existed in the past (e.g., Federal Communications Commission,

1976) and are still in place today (e.g., Federal Communications Commission, 1996), suggest that such requirements could survive First Amendment scrutiny.

The second key applicational aspect of the public interest standard involves whether specific policies contain criteria by which their contribution to underlying policy principles can be assessed. Communications policymaking has long been plagued by a failure to demonstrate that individual policies effectively promote the principles that motivated their creation (Napoli, 2001). Thus, within this applicational context, the problem is essentially one of developing and employing meaningful and effective analytical criteria to allow policies to be assessed in terms of whether or not they fulfill public interest principles.

Consider, for instance, the FCC's one-time policy promoting integration of broadcast station ownership and management. This policy was intended to increase licensee sensitivity to local community needs; sensitivity which was to manifest itself in the form of local programming (Bechtel v. Federal Communications Commission, 1993). Thus, the integration requirement is best thought of as an expression of the Commission's long-held localism dimension of the public interest principle. However, the Circuit Court of Appeals for the DC Circuit struck down the rule, concluding that "the Commission [has] accumulated no evidence to indicate that [the policy] achieves even one of the benefits that the Commission attributes to it" (Bechtel v. Federal Communications Commission, 1993, p. 880). Thus, absent empirical evidence that locally-based owners exhibit a greater commitment to localism than non-local owners, it was impossible for the Commission to convince the court that the policy served the public interest.

Consider also the Commission's actions on behalf of the diversity principle. The Commission has long operated under the assumption that regulations designed to increase the

diversity of sources will lead to a greater diversity of content (Napoli, 1999). This assumption is central to the objectives of many diversity policies and is thus essential to their validity under judicial scrutiny. Unfortunately, the FCC generally has not (until very recently; see Mason, Bachen, & Craft, 2001) attempted to empirically assess the relationship between these two components of the diversity principle in an effort to justify policy actions of this sort. It was the absence of evidence of such a relationship that led the D.C. Circuit Court to overturn the Commission's gender preference in broadcast licensing (Lamprecht v. Federal Communications Commission, 1992), which was intended to diversity broadcast content. The underlying assumption was that female owners would program their stations differently from male owners, thereby bringing greater content diversity to the airwaves. Absent any evidence of such content differences, the policy was, in the court's view, baseless.

More recently, the same court similarly dismantled the FCC's Equal Employment Opportunity (EEO) hiring rules (Lutheran Church-Missouri Synod v. Federal Communications Commission, 1998), which attempted to promote content diversity through requirements that broadcasters hire a diverse workforce. In this case, the FCC's failure to demonstrate that greater workforce diversity led to greater content diversity contributed to the elimination of the EEO rules (Lutheran Church-Missouri Synod v. Federal Communications Commission, 1998). A subsequent rewrite of the EEO rules still lacked any substantive empirical evidence (see Federal Communications Commission, 2000), and was also struck down (MD/DC/DE Broadcasters Association v. Federal Communications Commission, 2001).

In each of these cases, it was a failure on the Commission's part to translate their policy objectives into concrete assessment criteria – and to engage in the necessary assessments – that

led to the demise of these policies. Thus, if a policy is intended to enhance content diversity, what would constitute proof of its effectiveness? An increased diversity of program types (Grant, 1994)? An increased diversity of types of news stories covered (Busterna, 1988)? An increased diversity of races and ethnicities depicted on-screen (Kubey, et al., 1995)? If a policy is intended to produce greater sensitivity to community concerns, how might the effectiveness of such a policy be assessed? By monitoring changes in the availability of local public affairs programming ("What's local about local broadcasting," 1998)? By studying changes in the geographic points of origination of local news stories (Adams, 1978; 1980)? In the policy examples discussed above, such questions went unasked and unexplored, reflecting a persistent failure to establish and employ explicit criteria to be used in the assessment of these policies. This problem strikes at the applicational level of the public interest because the establishment of concrete assessment criteria represents the final, most explicit stage in the application of the public interest principle, the stage at which the underlying policy principles are translated into measures that help policymakers determine whether they have effectively applied the principles associated with the public interest.

This pattern of failure to establish and utilize meaningful assessment criteria is not surprising, given policymakers' failure to adequately define the operational principles upon which the policies are based (see above). Clear and specific operational definitions provide the basis upon which applicational criteria must develop. Thus, for example, only when the diversity principle is clearly defined can specific criteria for assessing the effectiveness of presumed diversity-enhancing policies be constructed. In this way, the failure to adequately define the central principles that comprise the public interest contributes to the ambiguity that exists at the applicational level at which these principles are put into practice.

Conclusion

As this analysis has suggested, the public interest concept is well-defined at the conceptual level; however, there is persistent ambiguity at the operational and applicational levels. The obvious question that arises is why has this ambiguity persisted for so long? Some would argue that this ambiguity is by design and is, in fact, necessary for effective communications policymaking. According to the advocates of this perspective, this built-in ambiguity facilitates administrative flexibility and responsiveness to an industry that is highly dynamic and unpredictable. As Krasnow and Goodman (1998) state: "The public interest notion . . . was intended to enable the regulatory agency to create new rules, regulations, and standards as required to meet new conditions" (p. 609). It may also be the case, as some have argued, that this ambiguity has been preserved to better facilitate congressional control over the FCC. The absence of an explicitly defined set of criteria for regulatory performance may make it easier for Congress to attack FCC decisions as not living up to the congressional intent of the public interest standard, and to advocate certain policy options as representative of the congressional intent behind the public interest terminology (Emery, 1971; Shooshan & Krasnow, 1987; Williams, 1976, p. 337). As Shooshan (1998) states: "Congress (or influential members of Congress) can always declare, 'that is not what we meant by the public interest'" (p. 625).

Clearly, the first of these arguments is practical, while the second is political. Looking first at the practical argument, recent developments in communications policymaking suggest that this ambiguity need not be maintained. Consider, for instance, the current position taken by Congress and the FCC on the universal service dimension of the public interest principle. The Telecommunications Act of 1996 ordered the FCC to reach an explicit definition of the universal

service principle (within normative parameters established by Congress), and required the Commission to periodically revisit this definition, and potentially alter it to reflect changing social and technological conditions (Telecommunications Act of 1996, Section 254). Consequently, today the concept of universal service is very explicitly defined (Federal Communications Commission, 1997) and suffers little of the ambiguity characteristic of other guiding policy principles. This example illustrates that intentional and persistent ambiguity is not the only possible method of dealing with rapidly changing technological conditions. The operationalization of the public interest could be similarly clarified and revisited on a regular basis to ensure it remains an appropriate reflection of contemporary policy imperatives. Similarly, at the applicational level, public trustee performance criteria and policy assessment criteria could be more explicitly defined and revisited on a regular basis. Formalizing the definitional process in this way would facilitate flexibility while at the same time mitigating against the extreme ambiguity and inconsistency characteristic of these aspects of the public interest standard today.

Turning next to the political argument, there is little normative justification for maintaining an ambiguous public interest standard – at any level – in order to facilitate congressional influence over the FCC. The FCC is already extremely vulnerable to a variety of congressional influence tools. The fact that Congress controls the FCC's budget alone is an incredibly powerful tool of influence over what is supposed to be an independent regulatory commission. As many analysts of the communications policymaking process have noted, the process is driven much more by politics than by analysis (Napoli, 2001; Olufs, 1999). Alleviating some of the ambiguity in the public interest standard could contribute to greater balance in the extent to which these two forces drive policymaking. Clearly, from a self-interest standpoint, such increased specificity is unlikely

to come from Congress. Instead, they must come from the FCC, which ultimately could find itself more resistant to congressional (not to mention judicial) influence if it where to bring greater operational and applicational specificity to the public interest standard (see Pitsch, 1984).

Although these recommendations may never come to fruition, it is hoped that the analysis presented here will, at least, contribute to a greater clarification of the points of discussion for the inevitable future debates over the meaning – or lack thereof – of the public interest standard.

--

References

Adams, W.C. (1978). Local public affairs content of TV news. Journalism Quarterly, 55, 690-695.

Adams, W.C. (1980). Local television news coverage and the central city. Journal of Broadcasting, 24(2), 253-265.

Bailey, S.K. (1962). The public interest: Some operational dilemmas. In C.J. Friedrich (Ed.). Nomos V: The public interest (pp. 96-106). New York: Atherton Press.

Barth, T.J. (1992). The public interest and administrative discretion. American Review of Public Administration, 22(4), 289-301.

Baughman, J.L. (1985). Television's guardians: The FCC and the politics of programming, 1958-1967. Knoxville, TN: University of Tennessee Press.

Bechtel v. Federal Communications Commission, 10 F.3d 875 (D.C. Cir. 1993).

Benditt, T.M. (1973). The public interest. Philosophy & Public Affairs, 2(3), 291-311.

Box, R.C. (1992). The administrator as trustee of the public interest: Normative ideals and daily practice. Administration & Society, 24(3), 323-345.

Broadcast regulation--Quantifying the public interest standard: Hearing before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, 98th Cong., 1st Sess. (1983).

Broadcasting Public Responsibility Act of 1981, H.R. 4726, 97th Cong. 1st Sess. (1981).

Broadcasting Public Responsibility and Deregulation Act of 1983, H.R. 2370, 98th Cong., 1st Sess. (1983).

Brown, D.H. (1994). The academy's response to the call for a marketplace approach to

broadcast regulation. Critical Studies in Mass Communication, 11(3) 257-273.

Busterna, J.C. (1988). Television station ownership effects on programming and idea diversity: Baseline data. Journal of Media Economics, 1(2), 63-74.

Caldwell, L.G. (1930). The standard of public interest, convenience or necessity as used in the Radio Act of 1927. Air Law Review, 1(3), 295-330.

Cochran, C.E. (1974). Political science and the public interest. Journal of Politics, 36(2), 327-355.

Cole, B., & Oettinger, M. (1978). Reluctant regulators: The FCC and the broadcast audience. Reading, MA: Addison-Wesley.

Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (1934).

Downs, A. (1962). The public interest: Its meaning in a democracy. Social Research, 29(1), 1-36.

Edelman, M. (1950). The licensing of radio services in the United States, 1927-1947: A study in administrative formulation of policy. Urbana, IL: University of Illinois Press.

Emery, W.B. (1971). Broadcasting and government: Responsibilities and regulations. East Lansing, MI: Michigan State University Press.

Federal Communications Commission (1946). Public service responsibilities of broadcast licensees, 11 FCC 1458.

Federal Communications Commission (1960). Network programming inquiry, report and statement of policy, 25 Fed. Reg. 7291. Reprinted in F.J. Kahn (Ed.) (1978), Documents of American Broadcasting (pp. 262-278). Englewood Cliffs, NJ: Prentice-Hall.

Federal Communications Commission (1976). Amendment to section 0.281 of the

Commission's rules: Delegations of authority to the Chief, Broadcast Bureau, 59 FCC 2d 491.

Federal Communications Commission (1996). Policies and rules concerning children's television programming: Revision of programming policies for television broadcast stations, 11 FCC Rcd. 10660.

Federal Communications Commission (1997). Federal-state joint board on universal service, 12 FCC Rcd 8776.

Federal Communications Commission (1999). Public interest obligations of TV broadcast licensees, 1999 FCC LEXIS, 6487.

Federal Communications Commission (2000). Review of the Commission's broadcast and cable equal employment opportunity rules and policies and termination of the EEO streamlining proceeding, 15 FCC Rcd. 22548.

Federal Radio Commission (1928). Statement made by the Commission on August 23, 1928, relative to the public interest, convenience, or necessity. Reprinted in F.J. Kahn (Ed.) (1984), Documents of American broadcasting, 4th ed. (pp. 57-62). Englewood Cliffs, NJ: Prentice-Hall.

Flathman, R.E. (1966). The public interest: An essay concerning the normative discourse of politics. New York: John Wiley & Sons.

Fowler, M.S., & Brenner, D.L. (1982). A marketplace approach to broadcast regulation. Texas Law Review, 60, 1-51.

Friedrich, C.J. (Ed.) (1962). Nomos V: The public interest. New York: Atherton Press.

Goodin, R.E. (1996). Institutionalizing the public interest: The defense of deadlock and beyond. American Political Science Review, 90(2), 331-343.

Grant, A.E. (1994). The promise fulfilled? An empirical analysis of program diversity on television. Journal of Media Economics, 7(1), 51-64.

Held, V. (1970). The public interest and individual interests. New York: Basic Books.

Henning, D.H. (1970). Administrative agencies, the public interest, and national policy: Is a marriage possible? Georgetown Law Journal, 59(2), 420-447.

Herring, P. (1936). Public administration and the public interest. New York: McGraw-Hill.

Hirsch, L.V. (1971). Introduction. In P.W. Cherington, L.V. Hirsch, & R. Brandwein (Eds.), Television station ownership: A case study of federal agency regulation (pp. 14-18). New York: Hastings House.

Holman, J., & McGregor, M.A. (2001). "Thank you for taking the time to read this:" Public participation via new communication technologies at the FCC. Journalism & Communication Monographs, 2(4).

Hundt, R.E. (1996). The public's airwaves: What does the public interest require of television broadcasters. Duke Law Journal, 45(6), 1089-1129.

Krasnow, E.G., & Goodman, J.N. (1998). The 'public interest' standard: The search for the Holy Grail. Federal Communications Law Journal, 50(3), 605-636.

Krattenmaker, T.G., & Powe, L.A. (1994). Regulating broadcast programming. Cambridge, MA: MIT Press.

Kim, H. (1992). How to talk back to your television set: A survey of Kentuckians. Unpublished master's thesis, University of Kentucky.

Kim, H. (1995). The politics of deregulation: Public participation in the FCC rulemaking

process for DBS. Telecommunications Policy, 19(1), 51-60.

Krugman, D.M., & Reid, L.R. (1980). The "public interest" as defined by FCC policy makers. Journal of Broadcasting, 24(3), 311-325.

Kubey, R., Shifflet, M., Weerakkody, N., & Ukeiley, S. (1995). Demographic diversity on cable: Have the new cable channels made a difference in the representation of gender, race, and age? Journal of Broadcasting & Electronic Media, 39(4), 459-471.

Kunkel, D. (1998). Policy battles over defining children's educational television. Annals of the American Academy of Political and Social Sciences, 557, 39-53.

Lamprecht v. Federal Communications Commission, 958 F.2d 382 (D.C. Cir. 1992).

Lasswell, H.D. (1962). The public interest: Proposing principles of content and procedure. In Friedrich, C.J. (Ed.), Nomos V: The public interest (pp. 54-79). New York: Atherton Press.

Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998).

Mason, L., Bachen, C.M., & Craft, S.L. (2001). Support for FCC minority ownership policy: How broadcast station owner race or ethnicity affects news and public affairs programming diversity. Communication Law & Policy, 6(1), 37-73.

Mayton, W.T. (1989). The illegitimacy of the public interest standard at the FCC. Emory Law Journal, 38(3), 715-769.

McGregor, M.A. (1986). The FCC's use of informal comments in rule-making proceedings. Journal of Broadcasting & Electronic Media, 30(4), 413-425.

McQuail, D. (1992). Media performance: Mass communication and the public interest. Newbury Park, CA: Sage.

MD/DC/DE Broadcasters Association v. Federal Communications Commission, 236 F.3d 13 (D.C. Cir. 2001).

Minow, N.N. (1978). Address by Newton N. Minow to the National Association of Broadcasters, Washington, DC. In F. Kahn (Ed.), Documents of American broadcasting (4th ed., pp. 207-217). Englewood Cliffs, NJ: Prentice-Hall.

Minow, N.N., & LaMay, C.L. (1995). Abandoned in the wasteland: Children, television and the First Amendment. New York: Hill and Wang.

Mitnick B.M. (1976). A typology of conceptions of the public interest. Administration & Society, 8(1), 5-28.

Napoli, P.M. (1999). Deconstructing the diversity principle. Journal of Communication, 49(4), 7-34.

Napoli, P.M. (2001). Foundations of communications policy: Principles and process in the regulation of electronic media. Cresskill, NJ: Hampton Press.

National Broadcasting Company, Inc. v. United States, 319 U.S. 190 (1943).

National Telecommunications and Information Administration (1997). A primer on the public interest obligations of television broadcasters. Washington, DC: U.S. Government Printing Office.

Olufs, D.W., III (1999). The making of telecommunications policy. Boulder, CO: Lynne Rienner.

Owen, B.M. (1975). Economics and freedom of expression: Media structure and the first amendment. Cambridge, MA: Ballinger.

Pitsch, P.K. (1984). When is government research in telecommunications policy needed?

In V. Mosco (Ed.), Policy research in telecommunications: Proceedings from the 11th annual Telecommunications Policy Research Conference (pp. 18-27). Norwood, NJ: Ablex.

Polic, J.G., & Gandy, O.H., Jr. (1991). The emergence of the marketplace standard: An examination of decisions by the Federal Communications Commission, and the US Court of Appeals for the District of Columbia regarding Petitions to Deny, 1963-1988. Journal of Media Law & Practice, 12(2), 55-64.

Powell, M. (2001, February 6). Press conference. Available: -- www.fcc.gov/realaudio/pc020601/ram.

Price, M.E. (1995). Television, the public sphere, and national identity. New York: Oxford University Press.

Ramberg, B. (1986). The Supreme Court and public interest in broadcasting. Communications and the Law, 8(6), 11-29.

Robinson, G.O. (1989). The Federal Communications Act: An essay on origins and regulatory purpose. In M.D. Paglin (Ed.), A legislative history of the Communications Act of 1934 (pp. 3-24). New York: Oxford University Press.

Rowland, W.D. (1997a). The meaning of "the public interest" in communications policy, part I: Its origins in state and federal regulation. Communication Law and Policy, 2(3), 309-328.

Rowland, W.D. (1997b). The meaning of "the public interest" in communications policy, part II: Its implementation in early broadcast law and regulation. Communication Law and Policy, 2(4), 363-396.

Schubert, G. (1960). The public interest: A critique of the theory of a political concept. Glencoe, IL: The Free Press.

Shooshan, H.M., III (1998). A modest proposal for restructuring the Federal Communications Commission. Federal Communications Law Journal, 50(3), 637-658.

Shooshan, H.M., III, & Krasnow, E.G. (1987). Congress and the Federal Communications Commission: The continuing contest for power. COMM/ENT, 9(14), 619-633.

Smith, C.R. (Ed.) (1989). The diversity principle: Friend or foe of the first amendment? Washington, DC: The Media Institute.

Sophos, M. (1990). The public interest, convenience, or necessity÷-A dead standard in an era of broadcast deregulation? Pace Law Review, 10(3), 661-705.

Sorauf, F.J. (1957). The public interest reconsidered. Journal of Politics, 19(4), 616-639.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), (codified in scattered sections of 47 U.S.C.).

"We are going to do it"; Hundt wants to quantify TV-radio public interest obligation. (1996, September 25). Communications Daily, p. 4.

"'What's local about local broadcasting?' A joint report of the Media Access Project & the Benton Foundation" (1998). Available: http://www.benton.org/Policy/TV/whatslocal.html.

Williams, R.J. (1976). The politics of American broadcasting: Public purposes and private interests. Journal of American Studies, 10(3), 329-340.

Figure 4.1

Levels of the Public Interest and their Central Questions.

CONCEPTUAL LEVEL

How should an institution charged with serving the public interest make its public interest determinations?

|
|
|
V

OPERATIONAL LEVEL

What specific values or principles should be associated with serving the public interest?

|
|
|
V

APPLICATIONAL LEVEL

What specific policy actions should be taken, or regulatory standards imposed?

1. This classification scheme adheres closely to the one presented by Held (1970). For related typologies, see Cochran (1974), Mitnick (1976), Ramberg (1986), and Sorauf (1957).

2. For a discussion of this section of the Fowler and Brenner (1982) article and its implications, see Brown (1994).

Law

AN "UNHOLY ALLIANCE": THE LAW OF MEDIA RIDE-ALONGS

by

Karen M. Markin

University of Rhode Island
Research Office
70 Lower College Road, #2
Kingston, RI 02881 USA
401 874.5971 voice
401 874.7044 fax
kmarkin@uri.edu

An "Unholy Alliance": The Law of Media Ride-Alongs

by
Karen M. Markin
University of Rhode Island

ABSTRACT

This paper describes and analyzes legal claims arising from the increasingly common journalistic practice of the media accompanying authorized individuals who are performing official duties. Courts were generally sympathetic to plaintiffs when the media accompanied officials into a home or other traditionally private space. The author concludes that legal support for the ride-along is weak and that the practice is not supported by either the libertarian or social responsibility theories of the press.

Tanya Barrett 's family called 9-1-1 after her mother shot herself in the chest. While waiting for help to arrive, they realized that their mother was dead. When the police emergency squad arrived, the family tried to prevent officials from handling her body. A dispute between family members and the police arose. Police forced family members to wait outside the house for hours and allowed a television crew to film them as they re-enacted their investigation of the scene. Police, who had cut the clothing from the mother's upper body to administer emergency medical treatment, allowed TV personnel to film the bullet wound in the mother's naked torso. Pictures of the dead mother's body were later broadcast. The family filed suit in federal district court against both the police and the broadcast station, stating several causes of action, including violation of her Fourth Amendment right to be free of unreasonable searches and seizures, and the state tort law claims of trespass and intentional infliction of emotional distress. The court denied the broadcaster's motion for summary judgment.[1]

Barrett's case stems from what has become known as ride-along reporting. It is an increasingly common practice, particularly among television outlets, as they seek to attract and maintain an audience.[2] The resulting programming is often used on shows called "reality TV" because they offer a cinema verite-style look at their subject. *Cops*, with its reggae theme song, "Bad Boys," is credited with being first in the genre of reality TV shows, airing in 1989 on Fox Television.[3] Imitations were quick to spring up, and the genre became increasingly popular in the 1990s. By the middle of the decade, there were 10 reality shows being aired widely around the country.[4] More recently, reality TV has taken its cameras to the hospital emergency room.[5] To be sure, reality TV shows were not the catalyst for most of the cases identified for this study; only about one-seventh of these cases arose from such programming.[6] But the ride-along as a form of gathering material for publication has become enduringly popular in recent years.

Lawsuits have followed. As a result, courts have been grappling with these cases throughout the past decade. Although the U.S. Supreme Court set limits on ride-along

reporting when it decided *Wilson v. Layne* in 1999, that ruling does not address the many issues raised in cases that result from the media accompanying authorized individuals.[7] For example, the fact that police were executing a warrant was pivotal to the Court's decision in *Wilson*. But as was illustrated with the *Barrett* case above, not all ride-alongs involve execution of a warrant. This paper will elucidate what the law of ride-alongs is, and offer a proposal for what it should be. Although *Wilson* did not settle the law of ride-alongs, it did represent a turning point in its development. For years, a varied legal landscape has characterized ride-along cases. *Wilson* indicates that limitations to the practice are now being set. This paper will clarify for plaintiffs, officials and the media the rules that are now emerging.

Press justifications for ride-along reporting, this paper will show, have fallen into two categories that reflect the two major press theories said to undergird the First Amendment. One argument is that ride-alongs allow the press to check on government, a press function that flows from libertarian theory. The other argument is that ride-alongs satisfy the public's right to know, a press function that flows from social responsibility theory. The case analysis presented below will show that ride-alongs conflict with both theories.

It is first necessary to define ride-along reporting as it will be used in this paper. Although this term[8] and similar ones, such as tag-along reporting[9] and sidekick journalism,[10] have been frequently used in recent years, their meanings have differed slightly. "Ride-along reporting" is a colloquial term used to describe situations in which the media accompany police who are engaged in official duties. Often, the duty is execution of a warrant, but that is only one of many situations in which journalists have accompanied authorized officials and ended up in legal trouble. In this paper, ride-along reporting will be defined as situations in which media representatives, for the purpose of gathering publishable material, accompany authorized individuals performing official duties. An authorized individual is defined as one who, through his or her job, has power or access that

others do not. In the ride-along cases, the individual shared that power or access with the media, giving rise to a legal claim.

Protections for Newsgathering

The First Amendment has been interpreted as providing broad protections for expression, but not for newsgathering. Two controlling theories have prevailed in newsgathering law, and legal scholar Steven Helle has observed that the choice of theory has decided whether a case was decided in favor of the press or the government. These theories, libertarian and social responsibility, define the duties of government and the press. Libertarian theory, with roots in the seventeenth-century writings of John Milton and John Locke, has led to decisions favoring the press.[11] Social responsibility theory grew from a 1947 report by the Commission on Freedom of the Press,[12] also known as the Hutchins Commission.[13] Adherence to the values espoused in the report has led to decisions in favor of government's ability to place limits on the press. These theories, discussed in detail in *Four Theories of the Press*[14] in 1956, have become dated in the twenty years since Helle's article was published.[15] However, they are worth reviewing here because their influence can nonetheless be seen in First Amendment jurisprudence, particularly in newsgathering cases.

Libertarian theory values the free and open exchange of ideas as the best means of discovering truth. It also views freedom of expression as a way to foster self-fulfillment and to control government. Realization of these values depends, Helle said, on adherence to two key principles: independence from government and emphasis of the right of the individual. Independence from government is the principle that informs the checking value of the First Amendment as explicated by Vincent Blasi.[16] Free expression is viewed as a check on governmental excess. Emphasis on the right of the individual stems from the values of individualism and self-fulfillment. In a libertarian framework, the state derives its authority from the consent of the governed. The rights of the individual define the extent of the state's power.

Libertarianism obviously presupposes that the roles of government and the press are closely intertwined in a democratic society. Freedom of the press is justified because it serves democracy. The press' crucial role is to serve as a watchdog over the official three branches of government. It is assumed that government is the primary concern of the press, and that limits on expression are most likely to come from government.[17] Contemporary commentators, however, have noted that extragovernmental actors such as transnational corporations now equal or exceed governments in resources and power, challenging these assumptions about the relationship between government and the press. While this is a valid criticism of libertarian theory as put forth by Siebert nearly half a century ago, it is not a fatal flaw for purposes of this analysis of ride-along reporting. By definition, ride-alongs involve the press and government, and the part of libertarian theory dealing with that relationship continues to be sound. In fact, the media have sometimes used the checking value to justify ride-alongs. In a friend of the court brief in *Wilson*, major media organizations argued that the practice aids in the scrutiny of official conduct.[18]

In other cases, however, the media have used the "public's right to know" to justify ride-alongs.[19] John Langley, co-creator of *Cops*, said of the reality TV-style program, "[I]t is pro-social. It can inspire people to think about solutions to problems. It can be enlightening to visit the problems within one's own society."[20] Under social responsibility theory, arguments for a newsgathering right rest primarily on the need of a self-governing people to be informed. As described by Helle, the two key principles to realization of these values are government intervention and public interest. Social responsibility theorists believe that government intervention in this flow is warranted when powerful, concentrated media fail to serve their role as informers of the electorate. Neoliberals, as adherents to social responsibility theory are called, tend to be concerned with abuses by corporations and other nongovernmental entities, while libertarians are concerned with abuses by government.[21] A leading twentieth-century criticism of the press was that it "wielded enormous power for its own ends."[22] In a social responsibility scheme, the state is ultimately responsible for press

performance. This theory, too, has been deemed outmoded, as technological advances have reduced the press' importance as an information source.[23] Nonetheless, the theory is manifested in commercial speech regulation, obscenity law and regulation of electronic media.[24]

Helle attempted to reconcile libertarian and social responsibility theory under a single approach to newsgathering law. By granting greater protection to publication than to newsgathering, the Court, Helle said, has implicitly sanctioned the notion that government has a right to deny information to its citizens. Instead, Helle proposed a newsgathering right based on the presumption that government has no right *not* to speak and has a duty to communication information within its possession. The private interests of the press are maintained in accordance with libertarian theory, and government assumes the duty of acting in the public interest in accordance with social responsibility theory.[25]

This paper argues that, even under Helle's analysis of a strong newsgathering right, ride-along reporting does not pass muster under the First Amendment. Such reporting violates the checking value that underlies libertarian theory because the press is colluding with the very institution it is supposed to monitor. Previous scholarship has argued that the nature of the ride-along — the media cooperating with government officials — compromises the press in its watchdog role.[26] One plaintiff called it an "unholy alliance."[27] Ride-alongs also violate social responsibility theory because, as the case analysis below will show, it does not involve government information in the strictest sense, such as documents or official proceedings.[28] Instead, ride-alongs stem from situations, such as execution of a search warrant at a private home, in which the government itself has limited authority to be present. Ride-alongs therefore result in the press providing contaminated information to the public, in violation of its social responsibility.[29] Courts[30] and commentators[31] also have criticized the press' performance of its role as informer of the electorate by decrying the coverage that resulted from ride-alongs as entertainment rather than news.

This paper contends that the ride-along represents the abuse of both media corporate power and government power to the detriment of individuals. Court opinions and previous scholarship often have analyzed ride-alongs as a contest pitting government against the press as the latter pursues the public's right to know. This paper argues that the contest is better viewed as pitting individual privacy and property interests against government and corporate media interests. By looking at the individual interest threatened in each ride-along case, we can arrive at a more consistent and appropriate analysis of these cases.

Perspectives on Ride-Alongs

Scholarship dealing with ride-alongs is disjointed because researchers have seldom approached it as a newsgathering technique to be explored for its legal consequences. Instead, scholars have typically examined ride-along reporting by focusing on the cause of action in a highly publicized case or two without much generalization to other areas of the law. This paper intends to bring clarity to the field by offering a comprehensive survey of the law of ride-along reporting and placing it within the framework of First Amendment scholarship.

Previous research can be divided into two broad categories: articles examining constitutional claims and articles examining tort law claims. Across the breadth of this scholarship, commentators generally found ride-alongs problematic from legal and ethical perspectives. Two key themes emerged. First, ride-alongs do not serve First Amendment values because they raise ethical concerns for participants; second, they are frequently viewed as a means for building audience share rather than fostering democracy. These two themes are rooted in the press theories used to justify ride-alongs. Ethical concerns about ride-alongs arise from the notion that the press serves as a check on government. Criticism of ride-alongs arise from the notion that the press has a social responsibility, not to entertain, but to provide information for self-governance.

Constitutional Claims

Scholarship on constitutional claims has concentrated on the Fourth Amendment, examining both media and official liability. Fourth Amendment claims arose when the media accompanied law enforcement officers who were executing a warrant. Professor Elsa Y. Ransom, a former television news producer, said the First Amendment privilege to gather news stopped short of supporting many ride-alongs. "There is no tradition of public access to the interior of a private dwelling and no essential role played by such access in the proper functioning of the criminal justice system that would justify press invasion of a private home," she stated.[32] Ransom acknowledged that some might favor ride-alongs on the ground that the press acts as a watchdog on government — the libertarian argument. But she disagreed: "[T]he effectiveness of the media in scrutinizing the conduct of law enforcement personnel may be greatly compromised given the potentially collusive and non-spontaneous nature of the joint enterprise."[33] Another commentator, taking a social responsibility perspective on media-police collaborations, proposed that the judge ruling on the warrant determine whether the value of the ride-along to society outweighed the suspect's privacy interest.[34] Other authors using a social responsibility perspective discussing were much more critical of the media, saying ride-alongs were driven by their quest for audience share and profits rather than by their devotion to democracy.[35] One of them deemed such ride-alongs per se violations of the Fourth Amendment and stated that courts should "refuse to let search warrants be used by the media as general admission tickets to the homes and lives of private citizens."[36]

The television industry itself has provided ample evidence that reality TV is more about good business than good democracy. "Broadbased demographics make reality shows popular with packaged goods manufacturers trying to sell frozen food and other staples to two-income families," according to one industry publication.[37] It is also telling to note that one popular reality show, "Real Stories of the Highway Patrol," is produced by a company known as Genesis Entertainment. The company's chief executive, Wayne Lepoff, credits its

success to its combination of live footage and reenactments. "People like the ride-alongs, but we find viewer interest in re-eenactments holds audiences even better."[38]

Scholars discussing official liability in media ride-alongs found the practice problematic for the authorized officials executing the warrant. Kevin E. Lunday, a U.S. Coast Guard lieutenant writing before the U.S. Supreme Court's decision in Wilson, urged the federal government to develop a consistent policy for determining when it is permissible for the media to accompany a federal search. The policy should take into account the expectation of privacy in the location to be searched; a private home would carry a high expectation of privacy. Lunday's argument drew upon the libertarian perspective, although he did not label it as such. He said that because federal officers are protectors of constitutional rights, it is critical for the public to trust them[39]

Other writers discussing official liability flatly opposed ride-alongs. One rejected the type of balancing test proposed by Lunday, arguing that it erodes the Fourth Amendment's imperative to control the police.[40] Another said that allowing the media to accompany authorized officials who are executing a warrant makes the search unreasonable under the Fourth Amendment.[41] Still another claimed that ride-alongs violate the sanctity of the home.[42]

Tort Law Claims

Scholarship examining tort law claims arising from ride-along reporting has emphasized trespass and privacy claims. Here, too, commentators have voiced little support for the ride-along, even those one might expect to be sympathetic to the media, such as journalism professor Kent R. Middleton. Middleton argued in a 1989 piece that journalists did not have a legal privilege to accompany officials into private homes, despite the custom and usage rationale articulated in *Florida Publishing Co. v. Fletcher* by the Florida Supreme Court in 1976.[43] Middleton, who focused on whether there existed a journalistic privilege to trespass, also claimed that the newsgathering values served by journalists engaged in ride-alongs did not justify the resulting violation of the homeowner's property

and privacy interests.[44] He emphasized the weakness of the right to gather news and the lack of historical support for extending a newsgatherer's right of access to a private home.[45]

Middleton also briefly discussed ethical concerns raised by ride-alongs. Echoing libertarian theory, he noted that it is difficult for the press to maintain the role of government adversary while relying on official custom to enter private homes.[46] Other scholars have examined the notion of a newsgathering privilege for journalists who trespass on private property, but not specifically within the context of a ride-along.[47] Efforts to establish such a privilege have been unsuccessful.[48] Finally, Middleton warned that journalists who ride along may face liability for intrusion and civil rights violations. Indeed they have. As this paper will show, many of the legal claims arising from ride-alongs in recent years have stated these causes of action.

In the realm of privacy law, one author examined the viability of these tort claims as a response to a ride-along or other intrusive newsgathering techniques commonly practiced by so-called "tabloid television."[49] The author argued that, despite the First Amendment and broad definitions of newsworthiness, privacy torts can be viable causes of action in claims against tabloid television, in large part because its programming is not "news" — a social responsibility-oriented analysis. A former journalist also discussed ride-along journalism and the right to privacy, using *Wilson v. Layne* as the focal point.[50] Journalists and journalism scholars interviewed for the article were themselves divided on whether the practice was journalistically sound.[51]

Causes of action

This study is limited to published opinions from state and federal courts since 1971, the year in which *Dietemann v. Time*, the earliest identified ride-along case, was decided by the Ninth Circuit of the U.S. Court of Appeals. A total of 47 court opinions dealing with ride-alongs were identified. Because "ride-along reporting" is not a category used in legal digests, and because the term is not always used in legal opinions involving the activity, case identification involved several steps. Cases were first identified using the index to *Media*

Law Reporter. These cases were used to compile a list of the causes of action that gave rise to claims of ride-along reporting. Appropriate key numbers in West's *Decennial Digests* and *General Digests* were then consulted for additional cases. Also used to identify cases were a casebook[52] and citations in already-identified opinions.

Ride-along reporting has spawned lawsuits based on an assortment of claims. The most common cause of action was one of the privacy torts: intrusion, appropriation, false light and private facts. A close second was violation of the plaintiff's civil rights, particularly the Fourth Amendment right to be free from unreasonable searches and seizures. Other common claims were trespass, intentional infliction of emotional distress, and eavesdropping and illegal wiretapping.

In every case, no matter what the cause of action, the media used photographic or audio equipment. Most of these claims arose from the presence of television crews, but three — including the case that went to the U.S. Supreme Court — involved newspaper or magazine photographers. No case was found in which someone sued over the presence of a reporter unaccompanied by a photographer.

Ride-along reporting also has led journalists to invoke shield laws.[53] In these cases, the journalist typically witnessed an arrest or the execution of a search warrant. The person who was arrested or whose property was searched then faced criminal charges. In preparing a criminal defense, the accused tried to compel the reporter-witness to testify about the arrest or compel a broadcast station to hand over footage shot during the search. Journalists and news organizations sought to avoid testifying or providing video by invoking reporter's privilege. These cases involve an attempt to obtain information that the journalist does not want to provide. They stand in contrast to the other ride-along claims, in which plaintiffs argued that the journalist had ventured somewhere or obtained some information that was off limits. Thus the shield-law cases are not analyzed here.

Civil Rights Violations

The most common type of claim resulting from a ride-along was an allegation of a civil rights violation. Twenty-four of the cases identified for this study included such claims.[54] Most often, the plaintiff claimed violation of his or her civil rights under Section 1983 of Title 42 of the U.S. Code.[55] To recover under Section 1983, two elements are required. First, the plaintiff must show that the defendant deprived him or her of a right secured by the Constitution. In most of the ride-along cases, that right was the Fourth Amendment's protection of citizens from unreasonable intrusions by government officials into areas where they have a reasonable expectation of privacy.[56] In a few cases, however, plaintiffs claimed violation of other rights, including the right to privacy as guaranteed by the Fourteenth Amendment,[57] and the right to protection from cruel and unusual punishment, as guaranteed by the Eighth Amendment.[58] Second, to recover under Section 1983, the plaintiff must show that the defendant acted under color of law when depriving him or her of that right.[59]

Civil rights claims that failed were evenly divided between those failing on the first element, deprivation of a constitutional right,[60] and those failing on the second element, that the defendant was acting under color of law. Courts were divided as to whether the media were acting under color of law in the ride-along cases. Most of the time they held that the media were not acting under color of law,[61] but in a few cases — *Barrett,*[62] *Berger v. Hanlon,*[63] *Dietemann v. Time*[64] — courts held that they were. In *Dietemann*, the court accepted the media's own claim that they were acting under color of law.

The civil rights claims have in common the fact that nearly all of them stemmed from an incident at a private home or other property with limited accessibility to the public.[65] This includes five cases that were filed by people who were incarcerated when the offending incident occurred.[66] Although courts generally were not sympathetic to the inmates, they were sympathetic to plaintiffs whose private homes had been invaded by the media. The best illustration of this point is provided by the U.S. Supreme Court's decision in *Wilson.* Writing for a unanimous court, Chief Justice Rehnquist outlined centuries of English law

that established the sanctity of the home. He cited a seventeenth-century court decision that referred to the home as one's "castle and fortress," and Blackstone's eighteenth-century *Commentaries on the Laws of England*, which stated that the law "will never suffer [the home] to be violated with impunity." Rehnquist continued: "The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home. ... Our decisions have applied these basic principles of the Fourth Amendment to situations, like those in this case, in which police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant."[67]

Lower courts showed similar sympathy for plaintiffs whose homes had been invaded by police accompanied by the media. *Ayeni v. CBS* was filed by a woman who was clad only in a dressing gown when a television crew, accompanying Secret Service agents, burst into her home and got footage of her young son crying behind the couch.[68] The district court stated, " CBS had no greater right than that of a thief to be in the home, to take pictures, and to remove the photographic record."[69] The woman also filed a case against the Secret Service agents, in which the court said, " A private home is not a soundstage for law enforcement theatricals."[70] In a case filed by another woman whose home was invaded by police and newspaper photographers who took pictures of her underwear-clad children, the court said, "A search warrant is simply not a press pass."[71]

Officials in these cases included police, Secret Service agents, members of Congress, U.S. Fish and Wildlife agents, district attorneys, prison wardens, Humane Society officers, U.S. marshals, a state Department of Agriculture official and a Drug Enforcement Agency officer. Police were not the only officials to execute warrants. Mistreatment of animals was the most common reason for non-police officials to execute a warrant. These included a Humane Society official investigating a puppy mill, a state department of agriculture official investigating an animal shelter and U.S. Fish and Wildlife agents investigating the poisoning of eagles.

Civil rights cases in which officials were not executing a warrant arose from a variety of situations. Some were filed by prison inmates who objected to being filmed or photographed by the media. Others were similar to the warrant cases in that officials investigating a crime cooperated with the media. For example, police rode in a television station's helicopter to fly over the residence of a suspected marijuana grower. In exchange, police permitted the TV station to videotape the scene.[72]

Even when officials were not executing a warrant, courts still were mindful about limiting the coercive power of the police. An example is *Barrett v. Outlet Broadcasting*, the case that arose from a 9-1-1 call reporting a self-inflicted gunshot wound.[73] Police were justified in entering the plaintiff's home, the court said, "and as such the police were temporarily placed in control of the premises," the court stated.[74] But it did not follow that it was permissible for police to allow a news crew into a private residence without placing any limits on the crew's conduct.[75]

An unusual case not involving a warrant, *Lauro v. City of New York*, arose from a "perp walk."[76] This is police slang for parading an arrestee outside the precinct upon request from the media.[77] A perp walk obviously does not take place in a traditionally private space, but it involves the same police coercion as does execution of a warrant. A federal district court said that this action violated the plaintiff's Fourth Amendment rights. "The perp walk conducted with the plaintiff was a seizure that intruded on plaintiff's privacy interests and personal rights, and was conducted in a manner designed to cause humiliation to plaintiff with no legitimate law enforcement objective or justification," the court stated.[78]

In the vast majority of the civil rights cases, plaintiffs claimed media liability rather than official liability,[79] although some claimed both.[80] Plaintiffs claiming official liability generally found a more sympathetic ear in court than did those claiming media liability. The U.S. Supreme Court's decision in *Wilson* is a case in point. Courts dismissed just three of the nine claims of official liability. One of them, *Holman*, was frivolous compared to the other civil rights claims.[81] Another, *Hicks*, failed because the plaintiff claimed violation of

the right to privacy, which the court said did not amount to a constitutional violation.[82] The third, *Avenson v. Zegart*, was out of sync with the rest of the decisions. The court in *Avenson* said that because the plaintiffs had no expectation of privacy at their home-based dog-breeding business. This contrasts with courts' acknowledgement of an expectation of privacy in *Benford, Dietemann* and *Prahl*, which all involved the conduct of business at a private home.

Plaintiffs in the civil rights claims fell into three broad categories. Half were people suspected of wrongdoing,[83] and the other half were either incarcerated individuals[84] or innocent bystanders.[85] Courts had a sympathetic ear for all four innocent bystander plaintiffs. They were sympathetic to only one of the five incarcerated plaintiffs. Decisions in the claims filed by suspects were more difficult to categorize. Courts were sympathetic to the plaintiff-suspect in half and to the defendant media organization or official in the other half. However, in cases filed by suspects that were decided in favor of the media, only one involved police as the officials, and it is arguable that the case, *Moncrief*, was wrongly decided. Courts seemed sensitive to limiting the coercive powers of the police, particularly when they affected innocent bystanders.

Similarly, it was the intrusive aspect of the ride-along, not publication, on which the *Wilson* court focused. It noted that the *Washington Post* never published its photographs of the incident.[86] The Court wrote that petitioner Charles Wilson was "dressed only in a pair of briefs" and petitioner Geraldine Wilson was "wearing only a nightgown" when officer and the media entered their home. Other courts, too, discussed the indignities faced by some of these plaintiffs during the ride-along. Tawa Ayeni was "clothed only in a dressing gown." The children of the plaintiff in *Hagler* were photographed "wearing nothing but their underwear," and the photos were published in a local newspaper. The court in *Lauro* said that the controversial perp walk "had the effect only of humiliating plaintiff, assisting the media in sensationalizing the facts of this case, and allowing Det. Charles to appear on television. None of these effects qualifies as a legitimate interest of law enforcement."[87]

Privacy

Nearly half of the forty-seven opinions reviewed for this study included privacy claims. Most common were claims of intrusion,[88] followed by private facts,[89] nonspecific claims of privacy,[90] false light[91] and appropriation.[92] Decisions in most of the privacy cases arising from ride-alongs followed the patterns of decisions in privacy cases against the media generally: Plaintiffs seldom prevailed. Of the four privacy torts, the intrusion claims were most likely to find a sympathetic ear in court. Those claiming false light or public disclosure of private facts were likely to meet with prompt dismissal of their cases. However, the appropriation claims stemming from ride-alongs were uniformly unsuccessful, unlike many appropriation claims arising from other situations.

Intrusion

Intrusion was the most frequently claimed privacy tort, figuring in half of the twenty-two cases with privacy claims. Five of the plaintiffs in intrusion claims found a sympathetic ear in court. The tort of intrusion consists of two elements: intrusion into a private place in a manner highly offensive to a reasonable person.[93] Consent is an absolute defense to intrusion. Courts applied these criteria when deciding the ride-along cases, with varying results.

The case that presented the clearest illustration of a viable intrusion claim was *Shulman v. Group W Productions*, decided in 1998 by the California Supreme Court.[94] The court reversed a lower court's summary judgment in favor of a television crew that made and broadcast an audio recording of an accident victim's conversation with a nurse in a medical rescue helicopter. Addressing the first element, the expectation of privacy, the *Shulman* court compared the helicopter to an ambulance. "Although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent" it stated.[95] Addressing the second element, the offensiveness of the intrusion, the court stated that the camera crew "took calculated

advantage of the patient's 'vulnerability and confusion.' Arguably, the last thing an injured accident victim should have to worry about while being pried from a wrecked car is that a television producer is recording everything she says ... for the possible edification and entertainment of casual television viewers."[96] The court said that a patient in these circumstances is incapable of giving consent.[97] Nor did the court find the intrusion privileged because it involved newsgathering.[98]

In contrast to the law enforcement officials who composed most of the authorized individuals in the civil rights claims, the official in *Shulman* was a nurse — a helper, not a law enforcer. Other intrusion cases involved officials who were helpers, including paramedics and a social worker. In *Miller v. NBC*, decided in 1986 by a California appeals court, the plaintiffs were the wife and daughter of a man who had suffered a heart attack in his bedroom.[99] When paramedics arrived to administer life-saving techniques, they were accompanied by a television crew that shot footage of the event. NBC used the film on its nightly news.

Another situation a court found highly offensive involved the bereaved relatives of a deceased family member. *Marich v. QRZ Media* was filed by the parents of a child who died from a drug overdose.[100] Unbeknownst to them, when police called to inform them of the child's death, a television crew was recording the telephone call for later broadcast on a show, "LAPD: Life on the Beat." The media defendant argued that there can be no expectation of privacy in a phone call from a police officer acting on official business. The court agreed only to the extent that the officer might share information with another officer. "[T]hat is not the same as a third person recording the conversation for later use on a commercial television program," the court stated.[101] The court in *Marich* also deemed that a jury could find the incident highly offensive. It noted that a call to a parent about the untimely death of a child is a "very personal and potentially agonizing situation."[102]

Plaintiffs in intrusion cases included crime suspects[103] and prisoners,[104] bereaved family members[105] an accident victim[106] and an Army lieutenant who underwent POW

training.[107] When the plaintiff prevailed, the location of the offending incident was always a place traditionally inaccessible to the general public: the home, a private ranch, a medical rescue helicopter, a prison. Plaintiffs who prevailed in the intrusion cases also had in common the fact that they were involved with authorized officials in life-and-death situations through uncontrollable misfortune. The plaintiff in *Shulman* had little choice but to allow the medical helicopter crew to take care of her. The parents in *Marich* were not expecting the bad news they received from the police. The family in *Miller* called for emergency medical help when the father suffered an apparent coronary; they had no way of knowing the paramedics would bring a TV crew into their home.

Private facts

Publication of private facts was a cause of action in four cases.[108] Elements of the tort are public disclosure of a private fact that is offensive to a reasonable person and that is not of legitimate public concern.[109] Private facts claims typically fail, and most fail because the fact is indeed of legitimate public concern, that is, newsworthy. All but one of the private facts claims stemming from a ride-along failed on the newsworthiness prong of the test.[110]

Private facts claims arose from incidents in a bar, a private home, a prison and a medical rescue helicopter. In all cases, a television crew captured sound or footage of the plaintiff in that location. An example is *Penwell v. Taft Broadcasting,* decided by an Ohio appeals court in 1984, filed by an innocent bystanders in a drug bust in a small-town bar. Plaintiff Billy Gene Penwell Jr. was having a drink when police ordered him to put his hands over his head, after which they frisked, handcuffed and removed him from the bar. A local television station captured the arrest on videotape and aired it on several news programs, even though police later determined that his arrest was a case of mistaken identity. Penwell's claim for private facts failed because of the event's newsworthiness. The court noted that his arrest was part of the largest drug raid in county history — a matter in which the public had a legitimate concern.

Other unsuccessful plaintiffs claiming this cause of action were those in *Shulman*, the case filed by the accident victim transported in the medical rescue helicopter, and in *Reeves v. Fox Television* filed by a man who police, accompanied by a television crew, arrested in his own home. The prisoner who filed *Huskey v. NBC* was allowed to go forward with his claim because the court agreed he was engaged in private activity when the camera crew filmed him in the prison exercise cage, where his distinctive tattoos were visible.

Officials in three private facts claims had coercive power: the prison warden in *Huskey*, and the police in *Reeves* and *Taft*. The official in *Shulman* was a nurse helping an accident victim in a life-threatening situation. When the media ride along with such officials, they may become privy to facts that people do not want publicized and will go to court to make that point.

False light

False light invasion of privacy is the publication of information in a manner that places a person in a false and offensive light.[111] Fewer and fewer jurisdictions are recognizing false light as a separate cause of action, distinct from defamation.[112] In keeping with this trend, courts rejected all but one of the six claims of false light filed in the ride-along cases.[113] The one case that survived summary judgment was *Pierson v. News Group Publications*, decided in 1982 by a federal district court.[114] Pierson was an Army officer who underwent prisoner of war training at a military reservation. The training was photographed, with the permission of Army officials, by a freelance photographer working with a print reporter. Pierson argued that the publicity made him appear weak, while the media defendant claimed it made him appear superhuman. The court said that the interpretation of the articles was a matter for the jury.[115]

Appropriation

Appropriation is the use of someone's name or likeness for trade or commercial purposes without consent.[116] Although it has become increasingly difficult for plaintiffs to

win most privacy claims against the media, they can still sometimes succeed with appropriation claims. Five ride-along cases included claims of appropriation. Courts rejected four of the claims,[117] and did not reach the issue in the fifth.[118] Courts' reasons for rejecting the appropriation claims fell into two groups: (1) the message at issue had a news purpose, not just a commercial purpose, or (2) the plaintiff's name had no intrinsic commercial value.

Other privacy claims

Plaintiffs who made general claims of violation of the constitutional right to privacy did not fare well in court.[119] Such was the case for lawyer Marvin Holman, the plaintiff in *Holman v. Central Arkansas Broadcasting*, decided by a federal district court in 1979.[120] When Holman got publicly drunk, he was placed in the city jail, where he became violent and loud enough to be heard on the street. A radio announcer arrived at the jail and attempted to interview Holman, who tried to snatch the broadcaster's microphone. The broadcaster recorded Holman's voice as he swore, yelled and pounded on the bars of his jail cell. Holman filed suit, claiming that police violated his privacy when they told the media he was in custody. The district court said that reporting the fact of an arrest and detention does not constitute invasion of privacy.[121]

Another inmate plaintiff, William Jones/Seymour, was similarly unsuccessful. Jones/Seymour was a state prisoner who claimed that the defendant prison superintendent allowed a television crew to film him without his consent. A federal district court said in 1992 the facts in *Jones/Seymour v. LeFebvre* were "not egregious enough" to state a cause of action for violation of the constitutional right to privacy.[122] The opinion contained insufficient information for further evaluation of this case.[123]

Trespass

Trespass was claimed in twelve cases identified for this study, making it a fairly common cause of action to stem from a ride-along.[124] Every trespass claim resulted from the presence of television reporters or newspaper photographers — never a print reporter

working alone. Most resulted from the presence of reporters in a private home or other traditionally private location such as a private school. A variety of officials were involved, from an animal welfare worker to a fire marshal. Most were enforcement officials of some type, but in two cases they were members of helping professions: an advocate for victims of domestic violence and a team of paramedics. Courts had a sympathetic ear for the media in four of the twelve cases.

Trespass protects against physical intrusions into the home or other private areas in which one has a possessory interest. Tort liability may result from entry to property that is without the permission of the owner or occupier.[125] Consent is therefore a critical issue in any trespass case, and the ride-along cases are no exception. Although some legal scholars have argued for a privilege to trespass to gather news,[126] courts have been reluctant to recognize one.[127]

The media used one of two defenses to claims of trespass resulting from a ride-along. Sometimes they argued that official permission to enter property was sufficient to defeat the possessor's claim of trespass. Courts uniformly rejected this argument, stating that authorized officials did not have the power to grant permission to non-officials to enter private property.[128] A Florida appeals court stated that to uphold such an assertion, "could well bring the citizenry of this state the hobnail boots of a Nazi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera."[129]

In one case, however, the media prevailed despite the lack of the possessor's consent. That case, *Florida Publishing Co. v. Fletcher*,[130] was decided by the Florida Supreme Court in 1976 and was also the earliest ride-along trespass case identified for this study. Courts deciding subsequent trespass cases have taken pains to distinguish *Fletcher* from the case at bar. In *Fletcher,* firefighters and police gathered at the scene of a fatal house fire and invited the news media to accompany them, as was their standard practice. Media representatives entered the house through the open door. There was no objection to their entry; the

homeowner was away and the remaining householder, a teenage girl, was dead. Media representatives did no damage to the property and entered for the purpose of news coverage of the fire and death. The fire marshal needed a picture of the silhouette left on the floor after removal of a dead girl's body. He ran out of film, so a newspaper photographer took a picture that became part of the official investigation file.[131] The dead girl's mother first learned of the fire and her daughter's death by reading the newspaper story and viewing the published photographs. The mother filed suit, claiming trespass, among other causes of action. But the court ruled that the journalists lawfully entered the Fletcher home under the doctrine of common custom, usage and practice. The court noted that the "fire was a disaster of great public interest,"[132] and that it had become customary for the news media to enter private property where such a disaster has occurred.

Media defendants in subsequent trespass cases have invoked the custom and usage defense, to no avail.[133] Sometimes courts explicitly rejected the custom and usage rationale.[134] Other times they emphasized that the media in *Fletcher* aided in the official investigation by taking a photo for the fire marshal.[135] Still other times they noted that *Fletcher* involved a disaster, while the case at bar did not.[136]

In other cases, the media insisted they had a qualified privilege under the First Amendment to gather news. Courts rejected the argument,[137] as they have in trespass cases that did not involve ride-alongs.[138] Accompanying authorized officials did not help journalists to defeat claims of trespass. The media generally prevailed only when the possessor consented to their entry,[139] even when plaintiffs argued that their consent was given under duress or was in some other way invalid.[140]

Courts protected citizens from police overreaching their coercive power in these cases. None of the four cases in which the media prevailed involved execution of a warrant. In three, *Baugh, Belluomo* and *Reeves,* the possessor had consented to the media's entry, albeit in confusion or duress. In the fourth, *Fletcher*, no one was present in the home but the dead fire victim.

Intentional infliction

Intentional infliction of emotional distress was a cause of action in eight ride-along cases,[141] and five passed the summary judgment hurdle.[142] All eight stemmed from the actions of television crews, and all but one[143] involved the TV crew's intrusion onto private property, usually a home. Three of these plaintiffs were the bereaved relatives of a deceased person,[144] and one was a battered wife.[145] Thus half the plaintiffs were victims of some sort rather than suspects. Officials involved in these cases included a social worker,[146] a team of paramedics,[147] a Humane Society officer[148] and a member of a National Guard rescue squad.[149] In five cases, courts noted the commercial nature of the TV entity's work.[150]

The tort of intentional infliction of emotional distress protects emotional security. Traditionally, it has been used to combat collection agencies and other creditors who use high-pressure methods, insurance adjusters using aggressive tactics to force a settlement and landlords who try to harass unwanted tenants into moving.[151] In recent years, the tort has been used in employment law in cases of workplace sexual misconduct. In family law, it has been used in divorce proceedings as a way to get a larger share of the marital estate. And in media law, intentional infliction has emerged as a cause of action as plaintiffs see other legal remedies, such as libel law and invasion of privacy, becoming increasingly ineffective.

Courts typically employ a four-part test to determine whether the plaintiff has stated a claim of intentional infliction: (1) the defendant intended to cause emotional distress, or knew or should have known that the actions taken would result in serious emotional harm to the plaintiff; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff's distress; (4) the emotional distress was severe.[152] A study of claims of intentional infliction against the media showed that although courts usually rejected cases based on the content of a report, they sometimes had a sympathetic ear for cases based on journalists' newsgathering behavior.[153]

All of the ride-along cases claiming intentional infliction were by definition based on behavior (the ride-along), and some of these plaintiffs did indeed find a sympathetic ear in court. The claims that passed the summary judgment hurdle were based on journalists' entry onto private property. Even though the tort protects emotional security, courts appear to be linking this emotional security to violation of one's physical security. In fact, in the three intentional infliction cases decided in favor of the media, courts based their analysis on the content of the broadcast rather than journalists' newsgathering behavior.[154]

Eavesdropping and wiretapping

Five claims of eavesdropping or wiretapping arose from ride-alongs.[155] All involved electronic media, either television and radio. Most were brought under Title III of the Omnibus Crime Control Act. Commonly referred to as the federal eavesdropping statute, this law protects the privacy of wire and oral communications and delineates the circumstances under which interception of such communications may be authorized.[156]

At least one legal scholar has advocated a qualified First Amendment privilege against tort liability for surreptitious newsgathering, based on the value of the social good that flows from press acquisition of information.[157] A review of the eavesdropping claims identified for this study, however, shows that courts are not recognizing any such privilege. A common thread in these cases is the court's scrutiny of the media's motive for intercepting the communication. Rather than assuming that a news organization was involved in newsgathering that would serve a democratic society, courts said it was a question of material fact whether the media were engaged in tortious conduct when they intercepted the communication. Courts also referred to the resulting broadcasts as commercial programming rather than news programming.[158]

The incidents leading to the claims occurred in places that the plaintiff considered private: the home, a private ranch, a jail cell. Two of the claims arose from an investigation by the U.S. House of Representatives into fraudulent insurance sales to the elderly; the others involved police and agents of the U.S. Fish and Wildlife Service as the officials.

These cases suggest that the law is not supporting journalists who, in cooperation with authorized officials, surreptitiously videotape or record the actions or words of others in a private home.

Benford v. ABC, one of the cases resulting from the congressional investigation of insurance fraud, provides a good example of courts' reasoning in the eavesdropping cases.[159] ABC claimed it was acting under color of law and therefore was exempt from the provisions of the federal eavesdropping statute. A federal district court disagreed. It stated: "Extending protection to private individuals acting in concert with government officials, *when their purpose is self-serving*, thwarts this primary congressional objective of protecting individual privacy."[160] This court apparently did not view ABC's activity from the perspective that democracy would be enhanced by press acquisition of information.

The California appeals court that decided *Marich,* the case filed by the parents who child died of a drug overdose, was similarly skeptical about the societal value of eavesdropping by the media.[161] The parents filed suit under section 632 of the California Penal Code, which governs eavesdropping on confidential communications.[162] This law provides greater privacy protection than the federal eavesdropping statute. Under the federal statute, only one party to a conversation needs to consent to its recording.[163] Under the California statute, if one party to a conversation has *not* consented to its recording, the statute has been violated. The court in *Marich* referred to the media's action as "recording the conversation for later use on a commercial television program."[164] Reversing the lower court's dismissal of the eavedropping claim, it said, "'defendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop in violation of section 632 or otherwise to intrude tortiously on private places, conversations or information.'"[165]

Consent was the pivotal issue in the two cases in which the media prevailed. In *Berger*, the Ninth Circuit held that because the wildlife service agent who wore a wire for CNN when he entered the home of a suspect was a party to the conversation and agreed to

its interception, CNN was not liable under the federal eavesdropping statute.[166] The court noted that the agent was acting under the authority of a search warrant.[167] None of the other officials involved in the eavesdropping cases identified for this study was executing a warrant. *Holman*, the case filed by the jailed drunken lawyer, also included an unsuccessful eavesdropping claim. "The Plaintiff knew he was being interviewed," the court said.[168]

ANALYSIS

In a ride-along, an authorized official provides the media with access to a situation that otherwise would be inaccessible. Sometimes this involves physical trespass onto private property or another traditionally private location, such as a prison. Other times it involves electronic access through a hidden microphone, or the ability to listen to an otherwise private conversation between an official and another individual. Plaintiffs perceive these situations as posing a threat to their privacy and property interests. But the media claim they have a First Amendment right to pursue stories in this fashion because they are serving in their capacity as watchdog on government or informer of the electorate.

Courts have given careful consideration to plaintiffs' interests and have not embraced the media's First Amendment arguments in many cases. Courts were generally sympathetic to the plaintiff when the media accompanied — physically or electronically — authorized officials into someone's home. Not all courts waxed as poetic as Rehnquist did in *Wilson* when he discussed the long history of the sanctity of the American home, but they generally accorded the same respect to this traditionally private space. Courts were also sympathetic about other traditionally private spaces that were not homes: the medical rescue helicopter in *Shulman*, the prison exercise cage in *Huskey*.

Many plaintiffs in the ride-along cases were people who did not have normal control over their environment. They could not consent to the media coverage that led to the suit. Courts seldom articulated this notion of consent unless it was explicitly related to the cause of action, as in the trespass cases. But a pattern emerges across the plaintiffs. Some were crime suspects or lived in the home of a crime suspect and were confronted by warrant-

wielding police. In other cases, they were trauma victims or their family members — some in literally life-or-death situations — seeking aid from health professionals or victim's advocates. Others examples included prisoners, a soldier on a military reservation and a mentally disabled person in a hospital. Clearly many of them were in no position to evict the media from the premises.

On the other side of the equation, most of the authorized individuals involved in these cases were enforcement officials of some sort — police, animal safety officers, federal agents. These individuals wielded coercive power even when they were not executing a warrant. But a few were members of the "helping professions": the flight nurse in *Shulman*, the victim's advocate in *Baugh*, and the paramedics in *Miller*. Courts were sympathetic to plaintiffs in these cases also, specifically citing the victims' vulnerability at the time of the media encounter. Though no court stated it explicitly, their holdings indicate that one who needs the services of a public helper such as a paramedic or social worker does not necessarily make him or herself a limited public figure or "fair game" for the media. This rationale echoes that of *Time Inc. v. Firestone*,[169] in which the U.S. Supreme Court held that Mary Alice Firestone's divorce proceeding was not a public controversy as defined in *Gertz v. Robert Welch Inc.*[170] Nor was she a public figure. The Court noted that Mrs. Firestone was compelled to go to court to seek relief in a marital dispute.[171]

At the root of virtually every one of these claims was an electronic or photographic medium: television camera crews, audio recording or newspaper photographers. Plaintiffs were not targeting the lone, notebook-toting reporter. People who were the target of media scrutiny evidently found the gathering of photos, footage and audio offensive. These forms of newsgathering also tend to generate most complaints about sensational journalism. As journalism has become more sensational, courts have been more likely to construe it as entertainment rather than news. Courts with a sympathetic ear for the plaintiff in these ride-along cases described the information sought as entertainment material rather than news about a matter of public concern.

The viewing of electronic and print media differently for legal purposes is cause for concern. Control of the type of media permitted to cover events is tantamount to control of content, according to Helle. He used *Garrett v. Estelle* to illustrate that newsgathering and publication are inseparable.[172] In *Garrett*, the Fifth Circuit of the U.S. Court of Appeals stated that a television cameraman had no greater right than the public to film an execution. The court stated that the cameraman was not prohibited from simulating or recounting the incident, and therefore could convey the same content as the two print reporters allowed to witness the execution. Helle said the fact that a simulation or narrative was acceptable but a broadcast was not suggested that the content of the latter must differ in a substantive way from the content of the former. Such restriction of expression raises constitutional questions, Helle argued, citing *Cohen v. California*,[173] in which the U.S. Supreme Court said "the emotive function ... may often be the more important element of the overall message sought to be communicated."[174]

Plaintiffs clearly seek to restrict expression by keeping the electronic media out of their homes and other private spaces. Courts are allowing such restriction, saying that government, which already has limited authority to forcibly enter these places, is exceeding this authority when it allows the media to ride along. So when — if ever — can a journalist ride along with authorized officials and avoid liability? Accompanying officials to a public place seems to protect a journalist from most civil rights, trespass and privacy claims. A crucial questions is whether the journalist sees what any other visitor to the premises sees or is instead given special treatment by officials. Thus the innocent bystander in the drug bust in *Penwell* did not succeed in a claim of false light, but the victim of the perp walk staged in *Haynik* was able to proceed with his case. Limiting ride-alongs to public places, however, will not eliminate lawsuits. Journalists can still face subpoenas if they witness a crime on the ride-along, as happened in the shield law cases discussed earlier.

Yet the ride-along does have journalistic value. Some of the most valuable ride-along journalism may have been the programming decried as sensational entertainment. The

broadcasts that prompted *Shulman,* the rescue helicopter case, and *Baugh,* the domestic violence victim case, were offensive to the plaintiffs but also gave the public a rare look at the work of some unsung heroes — an emergency flight nurse and a victim's advocate. Courts, however, are saying that the media may not barge uninvited into private homes or medical vehicles to capture these stories. Plaintiffs apparently do not want to share these stories with the public.

The press must resist the Faustian bargains that ride-alongs represent. Rather than allowing journalists to check on official conduct, the ride-along is a chance for officials to manipulate coverage of government. Government decides when the media can ride along. This is control of content in the same sense that prohibiting the cameraman in *Garrett* from broadcasting the execution was. The information resulting from a ride-along is tainted. Courts have suggested as much when they have criticized as self-serving those law enforcement officials who permitted ride-alongs.[175]

CONCLUSION

The law of ride-alongs has been evolving haphazardly over the past 30 years. The Court's decision in *Wilson* began to set limits on the practice, which has become increasingly common because it serves the media's bottom line, not because it serves democracy. In fact, ride-alongs seldom serve First Amendment values.

Neither of the two press theories considered to have constitutional justification — libertarian and social responsibility — supports the ride-along. When the media ride along at the pleasure of government officials, they cannot argue that they are serving as a check on the government's power. Such an arrangement transforms the press from government watchdog to government lapdog. Similarly, when the media are disseminating information from a ride-along that has been approved by government, they cannot argue that they are serving democracy by providing reliable information for self-governance. Rather, the information that flows from such arrangements is contaminated.

This paper has found little legal justification for the press to accompany officials into traditionally private spaces such as homes. To observe the law, the press may have to forgo stories of legitimate public concern, such as the work the domestic violence victims' advocate in *Baugh*. The content the press wishes to disseminate about such stories — footage of a distraught victims being assisted by an official — cannot be gathered by legal means. If the press continues to ride along, it will face the consequences in court.

---

[1] Barrett v. Outlet Broadcasting, 22 F. Supp. 2d 726 (S.D. Ohio 1997).
[2] For a discussion of the abundance of reality programming, *see, e.g.*, David Tobenkin, "Real Stories of a Crowded Genre," *Broad. & Cable*, May 22, 1995, at 16.
[3] Cynthia Littleton, "True Blue," *Broad. & Cable*, May 20, 1996, at 26.
[4] Tobenkin, *supra* note 1, at 18.
[5] *See, e.g.*, William C. Schumacher, "Lights! Camera! Blood! Action!" *Wall St. J.*, Oct. 13, 2000, at W15.
[6] Cases stemming from reality TV shows were Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Crowley v. Fox Broadcasting, 851 F. Supp 700 (D. Md. 1994); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997); and Shulman v. Group W. Productions, 955 P.2d 469 (Calif. 1998).
[7] 526 U.S. 603 (1999).
[8] *See, e.g.*, David E. Bond, "Note: Police Liability for the Media 'Ride-Along,'" 77 *B.U.L. Rev.* 825 (1997).
[9] *See* Casey Tourtillott, "Note: Wilson v. Layne: The Growing Relationship Between Law and Forcement and the Media: Should it Extend into Private Homes," 67 U.M.K.C. L. Rev. 445 (1998), at 445.
[10] *See* Kent R. Middleton, "Journalists, Trespass and Officials: Closing the Door on Florida Publishing Co. v. Fletcher," 16 *Pepp. L. Rev.* 259 (1989), at 260.
[11] For a more detailed discussion of the roots of libertarian theory, see Steven Helle, "The News-Gathering/Publication Dichotomy and Government Expression, 1982 *Duke L.J.* 1 (1982) at 4-6. For an in-depth discussion, see Fred S. Siebert et al., *Four Theories of the Press* 44-46 (1956).
[12] Siebert, *supra* note 11, at 75.
[13] Helle, *supra* note 11, at 20.
[14] Siebert, *supra* note 11.
[15] For a comprehensive discussion of this topic, *see Last Rights: Revisiting Four Theories of the Press* (John C. Nerone ed., 1995).
[16] Vincent Blasi, "The Checking Value in First Amendment Theory," 1977 *Am. Bar. Found. Res. J.* 522 (1977).
[17] Nerone, *supra* note 15, at 176.
[18] Julie Johnson, "Along for the Ride: Reality Journalism and the Right to Privacy," 4 *Harv. Int'l J. of Press/Politics* 106 (Summer 1999), at 109.
[19] See, e.g., Anderson v. WROC-TV, 441 N.Y.S.2d 220, 222 (N.Y. Sup. Ct. 1981); Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993); Huskey v. NBC, 632 F.Supp. 1282 (N.D. Ill. 1986).
[20] Littleton, *supra* note 3, at 26.
[21] Nerone, *supra* note 15, at 91.
[22] Siebert, *supra* note 11, at 78.
[23] Nerone *supra* note 15, at 165.
[24] Helle, *supra* note 11, at 32.
[25] *Id.* at 4.

[26] Elsa Y. Ransom, "Home: No Place for 'Law Enforcement Theatricals' — The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola," 16 *Loy. L.A. Ent. L. J.* 325 (1995). See also Middleton, *supra* note 10, and Randall P. Bezanson, "The New Free Press Guarantee," 63 *Va. L. Rev.* 731 (1977).

[27] Jones v. Taibbi, 508 F.Supp. 1069 (D.Mass. 1981) at 1073, quoting Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment, at 17.

[28] Proponents of a newsgathering right most often seek to gather governmental expression. Helle, *supra* note 11, at 52.

[29] Id. at 22.

[30] *See, e.g.*, Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).

[31] Bond, *supra* note 8; Eric B. Easton, "Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering," 58 *Ohio St. L.J.* 1135 (1997); Lyrissa Barnett Lidsky, "Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should do About It," 73 *Tulane L. Rev.* 173 (1998).

[32] Ransom, *supra* note 14, at 355.

[33] *Id.* at 356.

[34] John P. Cronan. "Note: Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs," 17 *Yale L. & Pol'y Rev.* 949 (1999).

[35] Brad M. Johnston, "Note: The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment," 58 *Ohio St. L. J.* 1499 (1997) at 1499; Christopher A. Rothe, "Note: The Legal Future of 'Reality' Cop Shows: Parker v. Boyer Dismisses Sec. 1983 Claims Against Police Officers and Television Station Jointly Engaged in Searches of Homes," 5 *Vill. Sports & Ent. L. Forum* 481 (1998), at 481.

[36] Johnston, *supra* note 34, at 1533-34.

[37] Cynthia Littlejohn, "Reality Television: Keeping the Heat On," *Broad. & Cable*, May 20, 1996, at 24.

[38] Tobenkin, *supra* note 2, at 17.

[39] Kevin E. Lunday, "Note: Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis," 65 *Geo. Wash. L. Rev.* 278 (1997) at 308.

[40] Bond, *supra* note 8.

[41] Sally S. Campbell, "Note: Lights, Cameras, Access: Should the Police Provide the Means for Television Stations to Violate the Fourth Amendment?" 22 *Dayton L. Rev.* 351 (1997) at 352.

[42] Tourtillott, *supra* note 9.

[43] Middleton, *supra* note 10, at 262. Middleton is identified as a journalism professor at 259.

[44] *Id.* at 262.

[45] *Id.* at 280.

[46] *Id.* at 294.

[47] David F. Freedman, "Note: Press Passes and Trespasses: Newsgathering on Private Property," 84 *Colum. L. Rev.* 1298 (1984); *see also* "Note: And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer," 103 *Harv. L. Rev.* 890 (1990).

[48] Lidsky, *supra* note 31, at 194, n.100

[49] Eduardo W. Gonzalez, "Comment: Get That Camera Out of My Face," 51 *U. Miami L. Rev.* 935 (1997).

[50] Johnson, *supra* note 20.

[51] *See also* "Symposium: The Newsworthiness Element: Shulman v. Group W Prods., Inc. Muddies the Waters," 19 *Loy. L.A. Ent. L.J.* 225 (1999) for a discussion of the California Supreme Court's definition of the newsworthiness element in the private facts tort as articulated in Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).

[52] C. Thomas Dienes, et al., *Newsgathering and the Law* 578-82 (1999).

[53] U.S. v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992); Delaney v. Los Angeles County, 789 P.2d 934 (Cal. 1990); Colorado v. Henderson, 847 P.2d 239 (Colo. Ct. App. 1993); Miami Herald v. Morejon, 561 So. 2d 577 (Fla. 1990); New York v. Griffin, 21 Media L. Rep. (BNA) 1030 (N.Y. Sup. Ct. 1992).

[54] Avenson v. Zegart, 577 F.Supp. 958 (D. Minn. 1984): Ayeni v. CBS, 848 F.Supp. 362 (E.D.N.Y. 1994); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Barrett v. Outlet Broadcasting, 22 F.Supp. 2d 726 (S.D. Ohio 1997); Benford v. ABC, 502 F.Supp. 1159 (D. Md. 1980); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997); Colorado v. Henderson, 847 P.2d 239 (Colo. Ct. App. 1993); Dietemann v. 449 F.2d 245 (9th Cir. 1971); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996); Hicks v. Cassilly, 971 F .Supp. 956 (D. Md. 1997); Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Jones v.Taibbi, 508 F. Supp. 1069 (D. Mass. 1981); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992); Lauro v. City of New York, 39 F.Supp. 2d 351 (S.D.N.Y. 1999); Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972); Moncrief v. Hanton, 10 Media L. Rep. 1620 (N.D. Ohio 1984); Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995); Nichols v. Hendrix, 27 MEdia L. Rep. (BNA) 1503 (N.D. Ga. 1999); Parker v. Clarke, 905 F. Supp. 638 (E.D. Mo. 1995); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996); Prahl v. Brosamle, 295 N.W.2d 768 (Ct. App. Wis. 1980); Smith v. Fairman, 98 F.R.D. 445 (C.D. Ill. 1982); Stack v. Killian, 96 F.3d 159 (6th Cir. 1996); Swate v.Taylor, 12 F. Supp.2d 591 (S.D. Tex. 1998); Wilson v. Layne, 526 U.S. 603 (1999).

[55] 42 U.S.C. Sec. 1983 (1994).

[56] Katz v. U.S., 389 U.S. 347, 353 (1967).

[57] Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995).

[58] Lauro v. City of New York, 39 F. Supp.2d 351 (S.D.N.Y. 1999).

[59] Adeckes v. S.G. Kress & Co., 398 U.S. 144 (1970).

[60] Benford v. ABC, 502 F. Supp. 1159 (D. Md. 1980); Colorado v. Henderson, 847 P.2d 239 (1993); Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992); Hicks v. Cassilly, 971 F. Supp. 956 (D. Md. 1997); Moncrief v. Hanton, 10 Media L. Rep. 1620 (N.D. Ohio 1984).

[61] Ayeni v. CBS 848 F. Supp. 362 (E.D.N.Y. 1994); Jones v. Taibbi, 508 F. Supp. 1069 (D. Mass. 1981); Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972); Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995); Nichols v. Hendrix, 27 Media L. Rep. (BN)0 1503 (N.D.Ga. 1999); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996); Prahl v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980).

[62] 22 F.Supp.2d 726 (S.D. Ohio 1997).

[63] 129 F.3d 505 (9th Cir. 1997).

[64] 449 F.2d 245 (9th Cir. 1971).

[65] Cases not arising from an incident at a home are Colorado v. Henderson, 847 P.2d 239 (Colo. Ct. App. 1993) (flyover); Hicks v. Cassilly, 971 F. Supp. 956 (D. Md. 1997) (bookstore); Jones v. Taibbi, 508 F. Supp. 1069 (D. Mass. 1981) (location unclear); Lauro v. City of New York, 39 F. Supp. 2d 351 (S.D.N.Y. 1999) (public perp walk); and Swate v. Taylor, 12 F. Supp. 2d 591 (S.D. Tex. 1998) (methadone clinic).

[66] Holman v, Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992); Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972);, Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995); Smith v. Fairman, 98 F.R.D. 445 (C.D. Ill. 1982).

[67] Wilson v. Layne, 526 U.S. 603 (1999) at 610.

[68] 848 F.Supp. 362 (E.D.N.Y. 1994).

[69] *Id.* at 368.

[70] Ayeni v. Mottola, 35 F.3d. 680 (2d Cir. 1994), at 686.

[71] 119 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996), at *7.

[72] This was Colorado Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972); Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995); Smith v. Fairman, 98 F.R.D. 445 (C.D. Ill. 1982).. Other cases were Benford v. ABC, 502 F. Supp. 1159 (D. Md. 1980); Dietemann v. Time, 449 F. 2d 245 (9th Cir. 1971); Prahl.v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980).

[73] 22 F.Supp.2d 726 (S.D. Ohio 1997).

[74] *Id.* at 737.

[75] *Id.* at 739.
[76] "Perp" is police slang for "perpetrator." 39 F.Supp.2d 351 (S.D.N.Y. 1999).
[77] *Id.* at 357.
[78] *Id* at. 363.
[79] Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996); Holman v, Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Lauro v. City of New York, 39 F. Supp. 351 (S.D.N.Y. 1999), Parker v. Clarke, 905 F. Supp. 638 (E.D. Mo. 1995); Swate v. Taylor, 12 F. Supp. 2d 591 (S.D. Tex. 1998); Wilson v. Layne, 526 U.S. 603 (1999).
[80] Holman v, Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994) and Ayeni v. Mottola, 35 F. 3d 680 (2d Cir. 1994); Parker v. Clarke, 905 F. Supp. 638 (E.D. Mo. 1995).
[81] Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979), was filed by a lawyer who was put in the city jail after being publicly drunk. Police telephoned a radio reporter, who taped the lawyer's yelling from a public area of the jail. The lawyer claimed that police violated his right to privacy by inviting the radio reporter.
[82] Hicks v. Cassilly, 971 F. Supp. 956 (D. Md. 1997) at 970.
[83] Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984); Benford v. ABC, 502 F. Supp. 1159 (D. Md. 1980); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Colorado v. Henderson, 847 P.2d 239 (Colo. Ct. App. 1993); Dietemann v. Time, 449 F. 2d 245 (9th Cir. 1971); Hicks v. Cassilly, 971 F. Supp. 956 (D. Md. 1997); Lauro v. City of New York, 39 F. Supp. 351 (S.D.N.Y. 1999); Moncrief; Stack v. Killian, 96 F. 3d 159 (6th Cir. 1996); Swate v. Taylor, 12 F. Supp. 2d 591 (S.D. Tex. 1998).
[84] Holman v, Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992); Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972);, Mullins v. Bookman, No. 1:94-CV-1591-MHS, 1995 U.S. Dist. LEXIS 17552 (N.D. Ga. 1995); Smith v. Fairman, 98 F.R.D. 445 (C.D. Ill. 1982).
[85] Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994); Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Barrett v. Outlet Broadcasting, 22 F. Supp. 2d 726 (S.D. Ohio 1997); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996); Prahl.v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980); Wilson v. Layne, 526 U.S. 603 (1999).
[86] Wilson v. Layne, 526 U.S. 603 (1999) at 608.
[87] Lauro v. City of New York, 39 F. Supp. 2d 351 (S.D.N.Y. 1999) at 364.
[88] Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993); Brown v. ABC, 704 F.2d 1296 (4th Cir. 1983); Hagler v. Philadelphia Newspapers, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996) Haynik v. Zimlich, 508 N.E.2d 195 (Ct. C.P. Cuyahoga Cty., Ohio 1986); Huskey v. NBC, 632 F.Supp. 1282 (N.D. Ill. 1986); Magenis v. Fisher Broadcasting, 798 P.2d 1106 (Ore.Ct.App. 1990); Marich v. QRZ Media, 86 Cal.Rptr.2d 406 (Cal. Ct. App. 1999); Miller v. NBC, 187 Cal. Ct. App. 1986); Mimms v. Philadelphia Newspapers, 352 F.Supp. 862 (E.D. Pa. 1972); Pierson v. News Group Publications, 549 F.Supp. 635 (S.D. Ga. 1982); Reeves v. Fox Television Network, 983 F. Supp. 703 (N.D. Ohio 1997); and Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).
[89] Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993); Carr v. Mobile Videotapes, 893 S.W.2d 613 (Tex. Ct. App. 1994); Huskey v. NBC, 632 F. Supp. 1282 (N.D. Ill. 1986); Marich v. QRZ Media, 86 Cal.Rptr.2d 406 (Cal. Ct. App. 1999); Penwell v. Taft Broadcasting, 469 N.E.2d 1025 (Ohio Ct. App. 1984); Pierson v. News Group Publications, 549 F.Supp. 635 (S.D. Ga. 1982); Reeves v. Fox Television Network, 983 F.Supp. 703 (N.D. Ohio 1997); and Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).
[90] Delan v. CBS, 458 N.Y.S.2d 608 (N.Y.App.Div. 1983); Dietemann v. Time, 449 F.2d 245 (9th Cir. 1971); Hicks v. Cassilly, 971 F.Supp. 956 (D. Md. 1997); Higbee v. Times-Advocate, 5 Media L. Rep. 2372 (S.D. Cal. 1980); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992); and Rogers v. Buckel, 615 N.E.2d 669 (Ohio Ct. App. 1992).
[91] Carr v. Mobile Videotapes, 893 S.W.2d 613 (Tex. Ct. App. 1994); Hagler v. Democrat-News, 699 S.W.2d 96 (Ct. App. Mo. 1985); Magenis v. Fisher Broadcasting, 798 P.2d 1106 (Or. Ct. App. 1990);

Penwell v. Taft Broadcasting, 469 N.E.2d 1025 (Ohio Ct. App. 1984); Pierson v. News Group Publications, 549 F.Supp. 635 (S.D. Ga. 1982); and Reeves v. Fox Television Network, 983 F.Supp. 703 (N.D. Ohio 1997).

[92] Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993); Delan v. CBS, 458 N.Y.S.2d 608 (N.Y.App.Div. 1983); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996); Pierson v. News Group Publications, 549 F.Supp. 635 (S.D. Ga. 1982); and Reeves v. Fox Television Network, 983 F.Supp. 703 (N.D. Ohio 1997).

[93] Restatement (Second) of Torts, Section 652B (1977).

[94] 955 P.2d 469, 26 Media L. Rep. 1737 (Cal. 1998).

[95] Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).

[96] *Id.* at 494.

[97] *Id.*

[98] *Id.*

[99] The other intrusion claim filed by bereaved relatives was Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

[100] 86 Cal.Rptr.2d 406 (Cal. Ct. App. 1999).

[101] *Id.* at 419.

[102] *Id.*

[103] Carr v. Mobile Videotapes, 893 S.W. 2d 613 (Tex. Ct. App. 1994); Haynik v. Zimlich, 508 N.E. 2d 195 (Ct. C.P. Cuyahoga Cty., Ohio, 1986); Reeves. v. Fox Television Network, 983 F.Supp. 703 (N.D. Ohio 1997).

[104] Huskey v. NBC, 632 F. Supp. 1282 (N.D. Ill. 1986); Mimms v. Philadelphia Newspapers, 352 F. Supp. 862 (E.D. Pa. 1972).

[105] Marich v. QRZ Media, 86 Cal.Rptr.2d 406 (Cal. Ct. App. 1999); Miller v. NBC, 187 Cal. App. 3d 1463 (Cal. Ct. App. 1986).

[106] Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).

[107] Pierson v. News Group Publications, 549 F. Supp. 635 (S.D. Ga. 1982).

[108] Huskey v. NBC, 632 F. Supp. 1282 (N.D. Ill. 1986); Penwell v. Taft Broadcasting, 469 N.E.2d 1025 (Ohio Ct. App. 1984); Reeves v. Fox Television Network, 983 F. Supp. 703 (N.D. Ohio 1997); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998).

[109] Restatement (Second) of Torts, Sec. 652D (1977).

[110] Huskey v. NBC, 632 F. Supp. 1282 (N.D. Ill. 1986).

[111] Restatement (Second) Section 652E, comment b (1977)

[112] *See* Ruth Walden and Emile Netzhammer, "False Light Invasion of Privacy: Untangling the Web of Uncertainty, 9 *Comm/Ent L.J.* 347 (1987).

[113] Carr v. Mobile Videotapes, 893 S.W. 2d 613 (Tex. Ct. App. 1994); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996); Magenis v. Fisher Broadcasting, 798 P.2d 1106 (Or. Ct. App. 1990); Penwell v. Taft Broadcasting, 469 N.E.2d 1025 (Ohio Ct. App. 1984); Pierson v. News Group Publications, 549 F. Supp. 635 (S.D. Ga. 1982); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[114] 549 F.Supp. 635 (S.D. Ga. 1982).

[115] *Id.* at 640.

[116] Restatement (Second) of Torts, Section 652C (1977).

[117] Baugh v. CBS, 82 F. Supp. 745 (N.D. Calif. 1993); Delan v. CBS, 458 N.Y.S. 2d 608 (N.Y. App. Div. 1983); Pierson v. News Group Publications, 549 F. Supp. 635 (S.D. Ga. 1982); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[118] Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996).

[119] Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979) (violation of civil rights under 42 U.S.C. Sec. 1983, specifically the constitutional right to privacy derived from the penumbra of the First, Fourth, Fifth and Ninth Amendments); Jones v. Taibbi, 508 F. Supp. 1069, 7 Media L. Rep. 1225 (D.Mass. 1981) (violation of civil rights under 42 U.S.C. Sec. 1983 and invasion of privacy); Jones/Seymour v. LeFebvre, No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992) (violation of the constitutional right to privacy).

[120] 4 Media L. Rep. 2300 (E.D. Ark. 1979).
[121] Citing Paul et al. v. Davis, 424 U.S. 693 (1975).
[122] No. 90-2267, 1992 U.S. Dist. LEXIS 225 (E.D. Pa. 1992).
[123] In Jones v. Taibbi, 508 F.Supp. 1069 (D. Mass. 1981), the plaintiff claimed violation of civil rights under 42 U.S.C. Sec. 1983 and invasion of privacy. Reporter Taibbi agreed with the Los Angeles Police Department not to disclose information about Jones until, if ever, Jones was arrested. In return, Taibbi would be permitted to film the arrest. Jones was arrested and Taibbi filmed and broadcast the event. The court rejected the civil rights claim, saying the reporter was not acting under color of law simply by making such an agreement with police. The court did not reach the privacy claim.
[124] Anderson v. WROC-TV, v. WROC TV, 441 N.Y.S.2d 220, 223 (N.Y. Sup. Ct. 1981); Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993); Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726 (S.D. Ohio 1997); Belluomo v. KAKE TV, 596 P.2d 832 (Ct. App. Kan. 1979); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), vacated, 526 U.S. 603 (1999); Carr v. Mobile Videotapes, 893 S.W.2d 613 (Tex. Ct. App. 1994); Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976); Green Valley School v. Cowles Florida Broadcasting, 327 So.2d 810 (Fla. Dist. Ct. App. 1976); Hagler v. Philadelphia Newspapers, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. 1996)(discussing official liability only); Miller v. NBC, 187 Cal. App. 3d 1463 (Cal. Ct. App. 1986); and Reeves v. Fox TV, 983 F.Supp. 703 (N.D. Ohio 1997).
[125] Restatemenet (Second) of Torts, Sec. 158 (1965).
[126] *See, e.g.*, "Note, And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer," *supra* note 32 and Freedman, *supra* note 32.
[127] For scholarly discussion of this topic, *see* Paul A. LeBel, "Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering," 4 Wm. & Mary Bill of Rts. J. 1145, 1158-1159 (1996); Lidsky, *supra* note 33, at 194, n.100 (1998); and Middleton, *supra* note 10, at 262. Cases in which courts declined to recognize such a privilege include Le Mistral Inc. v. CBS, 402 N.Y.S.2d 815 (1978) and Stahl v. State, 665 P.2d 839 (Okla. Crim. App. 1983).
[128] Anderson v. WROC TV, 441 N.Y.S.2d 220, 223 (N.Y. Sup. Ct. 1981) Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726, 746 (S.D. Ohio 1997); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997); Green Valley School v. Cowles Florida Broadcasting, 327 So.2d 810, 819 (Fla. Dist. Ct. App. 1976); Hagler v. Philadelphia Newspapers, No. 96-2154, 1996 U.S. Dist. LEXIS 9931, at *7 (E.D. Pa. 1996).
[129] Green Valley School v. Cowles Florida Broadcasting, 327 So.2d 810, 819 (Fla. Dist. Ct. App. 1976).
[130] 340 So.2d 914 (Fla. 1976).
[131] It is also worth noting that in Wilson v. Layne, 526 U.S. 603 (1999), the U.S. Supreme Court emphasized that the media were not assisting in execution of the arrest warrant that allowed police to enter the plaintiff's home. In Fletcher, the photographer obviously did help with the official investigation of the fire.
[132] 340 So.2d 914, 918 (Fla. 1976).
[133] Anderson v. WROC TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Green Valley Valley School v. Cowles Florida Broadcasting, 327 So.2d 810 (Fla. Dist. Ct. App. 1976); Prahl v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980)..
[134] Anderson v. WROC TV, 441 N.Y.S.2d 220, 223 (N.Y. Sup. Ct. 1981); Green Valley School v. Cowles Florida Broadcasting, 327 So.2d 810 (Fla. Dist. Ct. App. 1976) at 818.
[135] Prahl v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980).
[136] Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999).
[137] Anderson, v. WROC TV, 441 N.Y.S.2d 220,(N.Y. Sup. Ct. 1981); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999) Green Valley School v. Cowles Florida Broadcasting, 327 So.2d 810 (Fla. Dist. Ct. App. 1976); Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); Prahl v. Brosamle, 295 N.W. 2d 768 (Ct. App. Wis. 1980).
[138] Le Mistral v. CBS, 402 N.Y.S.2d 815 (1978) and Stahl v. State, 665 P.2d 839 (Okla. Crim. App. 1983).
[139] Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993).
[140] Belluomo v. KAKE TV, 596 P.2d 832 (Ct. App. Kan. 1979); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[141] Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726, 746 (S.D. Ohio 1997), Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Carr v. Mobile Videotapes, 893 S.W. 2d 613 (Tex. Ct. App. 1994); Crowley v. Fox Broadcasting, 851 F. Supp. 700 (D. Md. 1994); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[142] Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726, 746 (S.D. Ohio 1997), Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Carr v. Mobile Videotapes, 893 S.W. 2d 613 (Tex. Ct. App. 1994); Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986);.

[143] Crowley v. Fox Broadcasting, 851 F. Supp. 700 (D. Md. 1994).

[144] Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726, 746 (S.D. Ohio 1997), Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

[145] Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993).

[146] *Id.*

[147] Miller v. NBC, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

[148] Carr v. Mobile Videotapes, 893 S.W. 2d 613 (Tex. Ct. App. 1994).

[149] Crowley v. Fox Broadcasting, 851 F. Supp. 700 (D. Md. 1994).

[150] Barrett v. Outlet Broadcasting, 22 F.Supp.2d 726, 746 (S.D. Ohio 1997), Baugh v. CBS, 828 F. Supp. 745 (N.D. Calif. 1993); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *vacated*, 526 U.S. 603 (1999); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[151] *See* Daniel Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 *Colum. L. Rev.* 42 (1982).

[152] Restatement (Second) of Torts, sec. 46 cmt. c (1934).

[153] Karen Markin, "The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media," 5 *Comm. L. & Pol'y* 469 (2000).

[154] Crowley v. Fox Broadcasting, 851 F. Supp. 700 (D. Md. 1994); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Reeves v. Fox Television, 983 F. Supp. 703 (N.D. Ohio 1997).

[155] Benford v. ABC, 502 F.Supp. 1159 (D.Md. 1980)(concerning a congressional investigation of insurance fraud); Benford v. ABC, 554 F.Supp. 145 z9JD. Md.) (discussing official liability only); Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997)(U.S. Fish & Wildlife Service agent wears a wire in cooperation with CNN as he enters private home); Brown v. ABC, 704 F.2d 1296 (4th Cir. 1983)(concerning the congressional investigation of insurance fraud); Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300 (E.D. Ark. 1979)(lawyer's drunken rantings from jail cell, which are audible from public street, are recorded and aired on the radio); and Marich v. QRZ Media, 86 Cal.Rptr.2d 406 (Cal.App. 1999)(television crew records conversation in which police tell parents that their son has been found dead of an apparent drug overdose).

[156] 18 U.S.C. Sec. 2510 et seq. (1994).

[157] *See* LeBel, *supra* note 113.

[158] *See, e.g.*, Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), "officials could assist the media in obtaining material for their commercial programming," at 510; "law enforcement authority was used to assist commercial television," at 513. *See also* Marich v. QRZ Media, 86 Cal. Rptr. 2d 402 (Cal. App. Dist. 1999), "recording the conversation for later use on a commercial television program," at 419.

[159] 502 F.Suppp. 1159 (D. Md. 1980).

[160] 502 F.Supp. 1159, 1162 (D. Md. 1980)(emphasis added).

[161] 86 Cal. Rptr. 2d. 406 (Cal. App. 1999).

[162] Cal. Penal Code Sec. 632 (West 1999).

[163] 18 U.S.C. Sec. 2510 et seq. (1994).

[164] 86 Cal. Rptr. 2d. 406, 419 (Cal. App. 1999).

[165] *Id.* at 416, quoting Shulman v. Group W Productions, 955 P.2d 469, 495 (Cal. 1998).

[166] Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997).

[167] *Id.* at 516.

[168] Holman v. Central Arkansas Broadcasting, 4 Media L. Rep. 2300, 2302 (E.D. Ark. 1979)

[169] 424 U.S. 448 (1976).
[170] 418 U.S. 323 (1974).
[171] Time Inc. v. Firestone, 424 U.S. 448, 454 (1976).
[172] 556 F.2d 1274 (5th Cir. 1977).
[173] 403 U.S. 15 (1971).
[174] Helle, *supra* note 11, at 49, quoting Cohen v. California, 403 U.S. 15, 26 (1971).
[175] *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999): "Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home." *Id.* at 613. *See also* Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994): "A private home is not a soundstage for law enforcement theatricals. *Id.* at 686. "[T]he officers were assisting CBS in producing a atelevision show." *Id.* at 687.

IS INTERNET SERVICE PROVIDER IMMUNITY GROWING?: AN EXAMINATION OF IMMUNITY UNDER § 230 OF THE COMMUNICATIONS DECENCY ACT AFTER *ZERAN*

by
Elizabeth Spainhour

Master's Student
School of Journalism & Mass Communication
The University of North Carolina at Chapel Hill

Contact Information:
222 Old Fayetteville Rd. #H203
Carrboro, NC 27510
(919) 960-7918
eespain@email.unc.edu

Submitted to the Law Division of the
AEJMC National Convention

Abstract

In November 1997, the U.S. Court of Appeals for the 4th Circuit decided *Zeran v. America Online, Inc.*, a case involving defamatory postings on an Internet message board. The case was the first testing of Internet Service Provider (ISP) immunity offered by § 230 of the Communications Decency Act (CDA) of 1996. Section 230 states in part that an ISP is not liable as the publisher of third-party content available on its Internet systems.

Since *Zeran*, a number of courts have employed § 230 in their decisions. This paper examines 17 cases reported since *Zeran* to determine how or if immunity for ISPs has grown. The paper also addresses the circumstances under which non-traditional ISPs could receive § 230 immunity.

This study finds ISP immunity has indeed expanded beyond what is explicitly written in the statute or in *Zeran*. Courts have given ISPs protection for commercial third-party content and for activities such as Web hosting. Additionally, this research finds that although the statute does not address the issue, non-traditional ISPs could receive § 230 immunity for third-party content.

Finally, this study suggests a new paradigm in litigation in which plaintiffs seek to find ISPs liable for creation of online content. Research suggests that neither traditional nor non-traditional ISPs can receive CDA immunity for content created jointly or on their own.

IS INTERNET SERVICE PROVIDER IMMUNITY GROWING?: AN EXAMINATION OF IMMUNITY UNDER § 230 OF THE COMMUNICATIONS DECENCY ACT AFTER *ZERAN*

Only six days after the Alfred P. Murrow Federal Building in Oklahoma City, Okla., was bombed on April 19, 1995, an anonymous person posted a message to an America Online (AOL) Internet bulletin board system (BBS) advertising t-shirts with offensive slogans making light of the tragedy.[1] Unbeknownst to Kenneth Zeran, readers of the BBS were instructed to contact him if they were interested in purchasing the t-shirts.[2] Almost immediately, Zeran was barraged with harassing telephone calls, including death threats.[3] Zeran contacted AOL to have the message removed, and AOL complied; however, over the next few days, the unknown person continued to post prank messages, and enraged readers of the BBS continued their telephone assault on Zeran.[4]

Because the postings came from an anonymous party, Zeran could not sue the writer of the messages. Instead, he filed suit against AOL, alleging that AOL had "unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."[5] AOL countered that a recently passed federal statute rendered AOL absolutely immune from the suit.[6]

The U.S. Court of Appeals for the 4th Circuit decided this landmark Internet law case in 1997. *Kenneth M. Zeran v. America Online, Inc.* marked the first time in which a court ruled on Internet Service Provider (ISP) immunity under § 230 of the Communications Decency Act of 1996 (CDA).[7] Although the legislative history of the CDA is not long, it has been fraught with controversy.

---

[1] *Kenneth M. Zeran v. America Online, Inc.*, 129 F.3d 327, 329.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 327.
[6] *Id.* at 329.
[7] 47 U.S.C. § 230. The CDA is part of the massive Telecommunications Act of 1996. The CDA arose out of concern for protecting children from obscenity on the Internet and for settling the conflict between two

The "Good Samaritan" clause set forth in § 230 states, in part, the following: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[8] Additionally, no provider or user of an interactive service provider is to be held liable for good faith efforts to restrict access to or availability of material it considers "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[9]

Even as President Clinton signed the Telecommunications Act, which included the CDA, into law in 1996, a challenge was filed in Pennsylvania.[10] The result was *Reno v. American Civil Liberties Union*, in which the U.S. Supreme Court ruled portions of § 223 of the CDA unconstitutional; these subsections of the law prohibited Internet communications that were "indecent" or "patently offensive" to anyone under 18 years old.[11] Section 230 of the CDA was unaffected by the Court's decision in *Reno*.

Zeran was the first testing of the CDA after *Reno*. The 4th Circuit ruled for AOL and determined that § 230(c) rendered the ISP absolutely immune from suit. The court rejected Zeran's argument that although AOL was immune from publisher's liability for third-party content under § 230(c)(1), it was not immune from distributor liability. The distinction between publisher and distributor liability comes from defamation law. Bookstores, for example, are distributors of content and can only be held liable when they have knowledge of defamatory statements. Because publishers control content, defamation law assumes publishers have

---

seemingly contradictory precedents – *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), and *Stratton Oakmont v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995). Hoping to encourage ISPs to self-police content, Congress provided ISPs with immunity for third-party content.

[8] 47 U.S.C. 230(c)(1). Congress used the term "interactive service provider" to refer to ISPs.

[9] *Id.* at (c)(2).

[10] Andrew J. Slitt, Comment, *The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online*, 31 CONN. L. REV. 389, 399 (1998).

[11] *Id.* at 400. The subsections of the law in question were § 223(a) and § 223(d). The court found that the language of these two portions of the act, particularly the words "indecent" and "patently offensive," were too vague and violations of the First Amendment (at 403). After the Supreme Court's ruling, Congress amended the language of § 223. Congress also attempted to remedy the online obscenity issue with the Child Online Protection Act, 18 U.S.C. § 2251.

knowledge of any defamatory statements. Zeran argued that since AOL had knowledge of the defamatory statements posted on its BBS, it could be held liable as a distributor of the defamatory content. Even though the CDA never explicitly mentioned distributor liability, the court disagreed with Zeran, stating that distributor functions were encompassed in the CDA term "publisher."[12]

While the 4th Circuit wrote that the language of the CDA clearly stated that ISPs could not be held liable for content originating with third-parties,[13] the results of the 4th Circuit's interpretation of the act have been less clear. The purpose of this paper is to examine the legal cases decided using § 230 and to determine how or if the scope of immunity offered to ISPs has grown in recent decisions.

Literature Review

Much has been written on ISP liability in the three years since the 1997 *Zeran* decision. This literature review is organized according to three main areas of scholarly research on third-party ISP content: 1.) ISP immunity from defamation; 2.) ISP immunity from other tort claims; and 3.) potential immunity for non-traditional ISPs.

Defamation

ISP immunity from third-party defamation on the Internet is the primary area of research in the scholarly literature on § 230 of the CDA. With few exceptions,[14] most authors argue that the 4th Circuit in *Zeran* interpreted the CDA broadly. Several authors[15] have found that the court's

---

[12] 129 F.3d 327, 334.
[13] *Id.* at 328.
[14] See Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647 (2000).
[15] See Nancy W. Guenther, *Good Samaritan to the Rescue: America Online Free from Publisher and Distributor Liability for Anonymously Posted Defamation*, 20 COMM. & L. 35, n.2 (1998); Suman Mirmira, *Lunney v. Prodigy Services Co.*, 15 BERKELEY TECH. L.J. 437 (2000); David Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, at 168 (1997); Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9 (1999); Sarah Beckett Boehm, Comment, *A Brave New World of Free Speech: Should Interactive Computer Service Providers be Held Liable for the Material They Disseminate?*, 5 RICH. J.L. & TECH. 7 (1998); Steven M. Cordero, Comment, *Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law*, 9 FORDHAM I.P., MEDIA & ENT.

interpretation of the act in *Zeran* broadened the protection offered to ISPs by removing the distinction between publisher liability and distributor liability, a common law separation maintained in traditional media defamation cases and the distinction used prior to the enactment of the CDA.[16] At issue is Congress's intent in the CDA. The language of the act clearly gives ISPs immunity from publisher liability, but immunity from distributor liability is not explicitly mentioned.[17] As David Sheridan wrote, "both the text of the CDA and its meager legislative history support the conclusion that when Congress said 'publisher,' it meant 'publisher' and not 'distributor.'"[18] Thus, the CDA as interpreted in *Zeran* may not mirror congressional intent. Several of these same authors argue for a return to decisions based on the common law rather than the CDA.[19]

Other authors have disapprovingly pointed to courts broadening the type of third-party content for which the CDA offers ISPs protection. The CDA was enacted primarily as a means of protecting children from obscenity on the Internet. Andrew Slitt wrote, "Zeran was the first opportunity for the judiciary to interpret the Communication Decency Act in a case that involved not obscenity, the statute's target, but defamation – a branch of law not overtly contemplated by Congress during its deliberations of the CDA."[20] Michelle Kane pointed to broadening immunity

---

L.J. 775 (1999); Michelle J. Kane, Comment, *Blumenthal v. Drudge*, 14 BERKELEY TECH. L.J. 483 (1999); Annemarie Pantazis, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531 (1999).

[16] Publisher and distributor liability standards were used to decide both *Cubby* and *Stratton Oakmont*. A third area of distinction in traditional defamation cases is that of a common carrier, much like a phone company. Barbara H. Smith focused on how ISPs have been classified using these liability standards both before and since the CDA in defamation cases. Barbara H. Smith, *When Defamation Strikes Online: Determining the Liability of Internet Service Providers*, Presented to the Law Division of the AEJMC Southeast Regional (March 1999).

[17] 47 U.S.C. § 230(c)(1).

[18] Sheridan, *supra* note 15, at 168.

[19] Robert T. Langdon, *The Communications Decency Act § 230: Make Sense? Or Nonsense? – A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829, at 853 (1999); Sheridan, *supra* note 15, at 179; Pantazis, *supra* note 15, at 555.

[20] Slitt, *supra* note 10, at 399.

in *Sidney Blumenthal v. Matt Drudge and America Online, Inc.*,[21] the first case of Internet defamation that "involved not BBS postings, but *commercial* content, paid for by the ISP."[22]

Another important aspect of scholarly defamation research is the finding that ISPs have more protection under the CDA than any First Amendment protection given to newspapers or other traditional media. According to Nancy Guenther, "online service providers now enjoy protection against defamation liability that goes far beyond even the broadest defenses available to any other medium."[23] Several scholars found disparity in the treatment of print versus online publishers; they argued that electronic publishers are held to a looser standard of liability than traditional media outlets.[24] Both Sheridan and Slitt postulated that a print newspaper would face liability for a libelous letter to the editor but, because of CDA protection, could escape liability by publishing the same letter in the online version of its newspaper.[25] Still others speculated that a defamatory news article for which the print version of a newspaper could be held liable would escape liability if published in the same paper's online publication.[26] Robert O'Neil pointed to two instances in which the CDA's looser liability restrictions for the Internet may have affected two major newspapers' decisions to publish potentially defamatory articles online.[27]

Because of the combined decisions in *Zeran* and *Blumenthal*, in which the D.C. Circuit ruled AOL was not liable for third-party content paid for but not created by the ISP,[28] the

---

[21] 992 F. Supp. 44 (D.D.C. 1998).
[22] Kane, *supra* note 15, at 494. Emphasis added.
[23] Guenther, *supra* note 15, at § 3.
[24] Boehm, *supra* note 15, at 13; Kane, *supra* note 15, at 501; Slitt, *supra* note 10, at 414.
[25] Sheridan, *supra* note 15, at 149; Slitt, *supra* note 10, at 418. No court has ruled on this hypothetical.
[26] Walter Pincus, *The Internet Paradox: Libel, Slander & the First Amendment in Cyberspace*, 2 GREEN BAG 2D, 279, 279; Cordero, *supra* note 15, at Conclusion. There is no existing case law that supports this view.
[27] Robert M. O'Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 WASH. L. REV. 623, at 625 (1998). Three online articles were mentioned. The first involved *The Dallas Morning News* erroneously reporting online that Timothy McVeigh confessed to bombing the Alfred P. Murrow Federal Building in Oklahoma City, Okla. The second was same paper's online story about a Secret Service agent who allegedly saw President Clinton and Monica Lewinsky alone together in the White House. The third was a *Wall Street Journal* story about a White House staffer who testified he also witnessed an incident when Clinton and Lewinsky were alone together.
[28] In *Blumenthal*, the plaintiff argued that AOL could be held liable as a distributor since AOL paid for the content and should have had some knowledge of its defamatory nature. The court disagreed.

common feeling among scholars is that ISPs are immune from virtually any third-party defamation claim against them, including those in which the ISPs exercise editorial control over content.[29] Robert Langdon wrote, "[t]he net effect of section 230(c)(1) is to give free reign to the Internet companies to do whatever they please ... allowing virtually total immunity."[30] However, there has been no decision on an ISP's liability for defamatory content that it develops completely on its own[31] or jointly.[32]

Other Torts

There is a smaller body of scholarly literature analyzing ISP immunity from an array of tort claims other than defamation arising from third-party content.[33] Jonathan Friedman and Francis Buono wrote that the *Zeran* ruling "has become ... the basis for ongoing efforts by defendants to expand the reach of section 230 immunity in new directions."[34] Friedman and Buono stated that some post-*Zeran* courts have interpreted § 230 to provide not only immunity from defamation claims, but "from any tort claim that would make online providers liable for information originating with a third-party, including users and commercial partners."[35]

Suman Mirmira's study[36] of *Lunney v. Prodigy* is important in this area of research.[37] Lunney was a 15-year-old who sued Prodigy, an ISP, for libel per se because an anonymous party opened email accounts in Lunney's name and posed as Lunney to post vulgar messages to a BBS.[38] Although AOL moved for dismissal on grounds of § 230 immunity, the court declined to

---

[29] Langdon, *supra* note 19, at 848; Mirmira, *supra* note 15, at 442; Boehm, *supra* note 15, at 12; Slitt, *supra* note 10, at 420.
[30] Langdon, *supra* note 19, at 848.
[31] Pantazis, *supra* note 15, at 552.
[32] Kane, *supra* note 15, at 492.
[33] The cases in this area include *Doe v. AOL*, 729 So.2d 390 (Fla. 1999); *Blumenthal*; *Lunney v. Prodigy*, 1999 N.Y. LEXIS 3746; *Acquino v. Electriciti, Inc.*, 26 Med. L. Rep. 1032 (Cal. Super. Ct. 1997); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783; and *AOL v. Greatdeals.net*, 49 F. Supp. 2d 851, 855 (E.D. Va. 1999). Another case mentioned in passing is *Ben Ezra, Weinstein & Co. v. AOL*, 206 F.3d 980 (2000).
[34] Freidman & Buono, *supra* note 14, at 659.
[35] *Id.* at 649.
[36] Mirmira, *supra* note 15.
[37] *Supra* note 33.
[38] Mirmira, *supra* note 15, at 446.

apply § 230 and instead decided by using New York state common law.[39] The court relied on a common carrier privilege traditionally afforded to telephone companies; while the CDA makes no mention of ISPs being treated as common carriers, the court's finding that Prodigy was not liable for the defamation was consistent with ISP immunity under § 230.[40] In cases such as *Lunney*, involving anonymous posters to a BBS, the immunity conferred on ISPs results in victims who have no means of compensation.[41] The lack of recovery available to victims of tort and defamation is a considerable § 230 criticism voiced by authors.[42] Perhaps by not applying the CDA in *Lunney*, the court was attempting to distance itself from relying on § 230 to determine ISP liability.

Non-Traditional ISPs

A small body of literature supports the broadening of § 230 immunity for third-party content to extend to non-traditional ISPs.[43] Caitlin Garvey wrote that the fast pace of technology makes it difficult to form a precise definition for an ISP,[44] although § 230 defines an ISP as any provider that allows multiple users access to a computer server, such as the Internet.[45] Garvey argued that corporate Web sites should be considered ISPs, granting them the same third-party liability protection offered to AOL, Prodigy, and others.[46] Garvey stated, "corporations whose direct connections to the Internet mirror those of traditional ISPs are indeed ISPs despite the lack

---

[39] *Id.* at 451.
[40] *Id.*
[41] *Id.* at 452.
[42] *Id. See also* Langdon, *supra* note 19, at 853 and Slitt, *supra* note 10, at 389.
[43] For the purposes of this paper, the term non-traditional ISP is used to refer to Internet services provided by organizations other than AOL, Prodigy, CompuServe, and other companies created expressly for the purpose of connecting consumers to the Internet. A non-traditional ISP could be an Internet company with a Web site that provides chat room access or stock price information.
[44] Caitlin Garvey, Comment, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 DAYTON L. REV. 133, at 144 (1999).
[45] Specifically, § 230(f)(2) defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."
[46] *Supra* note 44, at 135.

of statutory guidelines."[47] Garvey reasoned that the term ISP includes all organizations that provide Internet-related services,[48] such as access to the World Wide Web, Intranets, email accounts, bulletin boards, and Web site hosting. According to Garvey, "Congress' and the computer industry's broad, functional approach to [defining] ISPs" makes the term ISP "all-encompassing."[49] Companies with direct connections to the Internet need to address under what laws they would be governed in the event that their employees create some form of third-party liability over corporate Web sites.[50]

Other authors have raised the possibility of consumer-oriented Web sites that may be protected from liability under § 230.[51] For example, Nicholas Terry argued that medical Web sites "that merely host or sponsor cybermedicine information provided by others should be immune from tort liability [through the CDA]."[52] Sheridan and Slitt speculated that an online publication would not be liable for third-party content,[53] while Walter Pincus and Steven Cordero suggested that even first-party content on the Internet would be protected.[54] However, there is no existing case law that directly answers the question of liability for private, non-traditional ISPs.

Scholars have discussed ISP liability for third-party content since *Zeran* in three areas: defamation, other torts, and non-traditional ISPs. They have focused on pre-*Zeran* cases[55] and later selected cases, including *Zeran*, *Doe v. AOL*, and *Blumenthal*, to show that ISP immunity has expanded from protection from liability for obscenity to protection from liability for third-party defamation and other tort claims. They have also speculated that the protection can be

---

[47] *Id.* A direct connection could be through a T1 line, for example, rather than through an ISP, such as AOL.
[48] *Id.* at 138.
[49] *Id.* at 140.
[50] *Id.* at 139.
[51] David Weiner, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905 (1999); Nicholas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 AM. J.L. AND MED. 327, at 364 (1999).
[52] Terry, *Id.* at 365.
[53] *See* Sheridan, *supra* note 15, at 149; Slitt, *supra* note 10, at 418.
[54] See Pincus, *supra* note 26, at 279 and Cordero, *supra* note 15, at Conclusion.
[55] Primarily *Daniel v. Dow Jones & Co.*, *Cubby, Inc. v. CompuServe, Inc.*, *Stratton Oakmont v. Prodigy Services Co.*, and *Reno v. ACLU.*

extended from traditional ISPs to non-traditional ISPs, such as companies that offer Internet access and services to employees at work. However, no one has yet studied *Ben Ezra, Weinstein, and Co., Inc. v. AOL* in depth, and no one has analyzed *John Does 1-30 v. Franco Productions*[56] or *Marczeski v. Law*[57] to see how or if these cases have broadened immunity. This paper will update the scholarly literature by tracing the developments in this area of the law since *Zeran*, including these two cases and a current case involving a non-traditional ISP's potential liability for an erroneous financial article.

Research Questions and Methodology

This paper will address the following research questions:

1). Have ISP liability cases since *Zeran* extended the level of § 230 protection afforded to ISPs for third-party content? If so, how?

2). Under what circumstances might non-traditional ISPs be granted § 230 protection for third-party content?

The paper will use traditional legal research methods to analyze federal cases at the U.S. District Court and U.S. Court of Appeals levels to determine how and in what ways ISP immunity has grown, if at all.[58] As the primary subject of scholarly CDA research relates only to liability for content created by others[59] – whether defamatory, otherwise tortious, or corporate – this paper will address cases decided using § 230, which also relates only to third-party content. Because of the large amount of scholarly literature on the assumptions, outcome, and implications

---

[56] 2000 U.S. Dist. LEXIS 8645.
[57] 122 F. Supp. 2d (2000).
[58] One case analyzed for this research (*Apollomedia v. Reno*) reached the U.S. Supreme Court. The opinion stated only that the decision of the appellate court was affirmed. At the time of this research, § 230 has been employed only in federal cases; the issue of immunity has not been raised in state court actions.
[59] With the exception of Pincus and Cordero, who discussed an online publication's immunity for content it creates on its own. See *infra* note 26.

of the *Zeran* decision, this research will not analyze the case in depth.[60] Rather, this paper will seek to answer the research questions by examining cases decided since *Zeran*.

Shepard's Citations reveals that there are 17 cases in which courts cited 47 U.S.C. § 230 in decisions between the time of the *Zeran* case and March 1, 2001.[61] All of these cases will be examined to determine the nature and extent of the courts' reliance on § 230 to decide cases and to see how or if immunity for third-party content has grown.

This paper will also use one pending case that has not yet been decided to illustrate the currency of the CDA immunity issue.[62] The case will suggest the ways in which immunity for third-party content could grow in the future.

Broadening of § 230 Immunity

While the majority of cases decided since *Zeran* have shown no broadening in ISP immunity at all, there are four cases in which the courts broadened the kind of content protected or extended immunity for ISP activities not explicitly protected by the CDA.

Expansion in Protected Content: Commercial Content

Perhaps the most significant expansion of ISP immunity since *Zeran* occurred when the U.S. District Court for the District of Columbia decided *Blumenthal v. Drudge and America Online, Inc.* in 1998.[63] AOL and Drudge had a licensing agreement that stipulated Drudge would receive $3,000 a month in exchange for allowing AOL to post his *Drudge Report* on AOL's site; Drudge created, edited, and updated the report, but AOL had the right to remove any content that

---

[60] This paper will also not deal with *Reno v. ACLU*, a case prior to *Zeran* in which parts of the CDA were invalidated. See *infra* note 11.

[61] This is the date of the last update to *Shepard's Citations* published at the time of this research.

[62] The CDA was referenced in an article about this case. See John C. Coffee, Jr., *The 'Emulex' Fraud: Can you Sue the Messenger?*, NEW YORK LAW JOURNAL, Sept. 28, 2000, Outside Counsel section, p. 3. Coffee wrote that if a defendant qualifies as an interactive computer service, liability is "foreclosed" by § 230.

[63] 992 F. Supp. 44 (1998). Matt Drudge, author of the online *Drudge Report*, wrote defamatory remarks about White House aide Sidney Blumenthal and posted them on his Web site. Because Drudge had signed a contract allowing AOL to host the Drudge Report on AOL's site in addition to his own home page, AOL also posted the defamatory Blumenthal story.

it determined violated AOL's terms of service.[64] When Blumenthal brought action against Drudge for a defamatory posting,[65] the plaintiffs asserted that AOL was also liable because it was acting outside its role as an interactive computer service; the plaintiffs claimed that AOL was jointly responsible for the defamation.[66] AOL had more than a "passive role" in the case because it had contracted Drudge, had the ability to remove or request changes to the content, and knew that Drudge would be writing "gossip and rumor."[67] The District Court for D.C. noted and rejected the argument that the *Washington Post* newspaper would be held liable if it had published the same defamation.[68]

In language reminiscent of the *Zeran* opinion, the court wrote:

> [I]t would seem only fair to hold AOL to the same liability standards applied to a publisher, or at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress made a different policy choice by providing immunity even where the interactive service provider has an active, even an aggressive role in making available content prepared by others.[69]

The court cited a House of Representatives conference report from 1996 in its interpretation of congressional intent; Congress believed that treating ISPs as publishers or speakers created obstacles in empowering parents to determine the content their children receive through the Internet.[70] The court also noted that AOL had enjoyed all the benefits of § 230 without accepting any of the self-policing burdens Congress intended.[71] In spite of this, the court ruled that the language of the CDA clearly stated that AOL was immune from suit.[72]

---

[64] *Id.* at 47.
[65] Drudge wrote an article claiming that Sidney Blumenthal had a history of spousal abuse.
[66] *Supra* note 63, at 50.
[67] *Id.* at 51. AOL not only knew the nature of the content Drudge wrote, but also advertised it as gossip and rumor to subscribers.
[68] *Id.* at 49.
[69] *Id.* at 51, 52.
[70] *Id.* at 52, citing H.R. CONF. REP. NO. 104-458, at 194 (1996). The court noted that the statute primarily addresses "obscenity and violent material," but that "otherwise objectionable material" is broad enough to include defamation.
[71] *Id.* at 52, 53.
[72] *Id.* at 53.

Although the court was reluctant to rule in favor of AOL and dismiss it from the case,[73] the court did extend protection to ISPs for third-party content for which it pays and controls some editorial rights. The *Zeran* court never considered commercial content in its opinion. While the *Blumenthal* court adheres to the *Zeran* court's inclusion of defamatory content in the sphere of CDA protection, it breaks new ground in including commercial content under CDA protection.

In *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, the 10th Circuit underscored the D.C. Circuit's protection of commercial content.[74] Ben Ezra sought damages and injunctive relief for three occasions on which AOL posted incorrect information about the company's stock price and share volume; Ben Ezra also alleged that AOL did not exercise "reasonable care" in changing the stock information.[75] AOL claimed CDA immunity, stating that it was an interactive service provider, not the creator of the stock content.[76] The issue in the case was whether AOL acted as an ISP or as an information content provider;[77] AOL conceded in its oral arguments that an ISP *could* act as an information content provider by participating in the creation or development of information and thus not qualify for CDA immunity.[78] While the 10th Circuit noted that AOL communicated with the financial data provider each time an error occurred, the court determined that this was not enough to constitute development or creation of the information.

The 10th Circuit ruled for AOL because the plaintiff could not prove that AOL had any role as an information content provider.[79] While the plaintiff filed a motion for further discovery into communications between AOL and the provider of the stock information, the court quoted a

---

[73] Id. at 51. The court wrote, "If it were writing on a clean slate, this Court would agree with the plaintiffs" that AOL should not have immunity for content that it might expect to be defamatory.
[74] 206 F.3d 980 (2000).
[75] *Id.* at 983.
[76] *Id.* at 985. S&P Comstock, Inc., a stock quote provider, and Townsend Analytics, Ltd., a software provider designated by Comstock, provided continuously updated stock price information to AOL for its Quotes & Portfolios service. The stock exchanges and stock markets are the original source of stock data. Neither party disputed that Comstock and Townsend were information content providers.
[77] An information content provider as defined in § 230(f)(3) is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."
[78] *Supra* note 74, at 985.

magistrate judge in the case who wrote, "to allow any further discovery beyond that already authorized by the court would deny an interactive service provider the immunity authorized by the Communications Decency Act."[80]

Expansion in ISP Activity: Web Hosting

In a case similar to *Ben Ezra*, the U.S. District Court for the Northern District of Illinois ruled ISPs could not be held liable for their activities as Web hosts. In *John Does 1-30 v. Franco Productions*, the anonymous plaintiffs alleged that as hosts of a Web site, GTE and PSINet were involved to some unknown degree in the creation and development of a site that sold videotapes of college athletes undressing in locker rooms.[81] The plaintiffs claimed that as Web hosts, the ISPs assisted in the creation of the Web site and acted as information content providers.[82] The court found that there was no evidence of the ISPs' involvement in the development of the site.

The case was ultimately dismissed for failure to state a claim on which relief could be granted. However, the court wrote that ISPs' "status as service providers under the CDA is not vitiated because of their Web hosting activities, whether viewed in combination with their roles as service providers or in isolation. Immunity under the CDA is not limited to service providers who contain their activity to editorial exercises or those who do not engage in web hosting...."[83] The court said that offering Web hosting services does not "magically [render the ISPs] the creators of those web pages."[84]

---

[79] *Id.* at 986. The court cited the contract between AOL and Comstock, which said that AOL could not modify the content Comstock provided.
[80] *Id.* As in this case, the plaintiffs in *John Does 1-30 v. Franco Productions* argued for additional discovery, but the court would not allow it because of the vagueness of the claims.
[81] 2000 U.S. Dist. LEXIS 8645.
[82] *Id.* at 7.
[83] *Id.* at 8.
[84] *Id.*

Expansion in ISP Activity: Spam Blocking

In 1999, an ISP for the first time employed the CDA to further a cause of action filed by the ISP. In *America Online, Inc. v. Greatdeals.net*,[85] AOL sued Greatdeals.net for "spamming" AOL subscribers.[86] The defendant made a series of counterclaims, including antitrust violations and tortious interference with contract. AOL moved to have the counterclaims dismissed, claiming CDA immunity under the Good Samaritan provision, § 230(c)(2)(a).[87] AOL argued that spam is harassing and falls into the "otherwise objectionable" category, restriction of which is protected by the CDA.[88] Although Greatdeals.net only advertised computers and computer-related equipment, AOL said that spam often contains pornography or "get-rich-quick" scams that offend subscribers.[89] The U.S. District Court for the Eastern District of Virginia granted AOL's motion to dismiss the defendant's counterclaims on CDA grounds. The court thus interpreted § 230's vague language in specifying "otherwise objectionable material" to include spam, and an ISP plaintiff for the first time used the CDA to further a legal action that it initiated.

No Broadening of § 230 Immunity

The majority of courts deciding Internet tort cases since *Zeran* refused to broaden § 230 immunity. In many of these cases, the courts simply cited portions of the CDA. The primary function of § 230 in this area of case law is referential; the courts did not decide these cases using § 230 of the CDA.

In several cases, the U.S. District Courts and U.S. Courts of Appeals used only CDA definitions of parties involved in the Internet, such as an "interactive computer service,"[90] but

---

[85] 49 F. Supp. 2d 851 (1999).
[86] Spam is unsolicited bulk email, usually containing advertisements.
[87] This section provides immunity from civil liability for good faith actions to restrict access to objectionable content.
[88] *Supra* note 85, at 855.
[89] *Id.*
[90] Interactive computer services are defined in § 230(f)(2). The Internet, information content providers, and access software providers are also defined in § 230(f). Cases that cite these definitions are *Sprint v.*

made no suggestion of broadening ISP immunity. In others, the district and circuit courts cited the language of U.S. policy as stated in the CDA. One of the most frequent policies invoked is § 230(b)(2), which reads as follows:

> [It is the policy of the United States] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

While the CDA is not the deciding factor in any of these cases, the courts adhere to this policy in findings for ISPs. For example, in *Howard v. America Online, Inc.*, Howard and other AOL subscribers sued the ISP for a variety of statutory violations and lost on grounds other than CDA immunity.[91] However, the 9th Circuit cited Congress's aim "'to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.'"[92] The 4th Circuit and U.S. District Court for the Eastern District of Virginia cited this same passage in three other tort claim cases in their rulings for ISPs.[93]

A court in *Sprint v. DeAngelo* also used § 230(b)(2), but did not find in favor of the ISP.[94] The difference in this case was that the ISP brought action against DeAngelo for violation of a non-disclosure agreement when he went to work for a competing company. The U.S. District

---

DeAngelo, 12 F. Supp. 2d 1192 (1998); *Apollomedia Corp. v. Reno*, 19 F.S.2d 1094 (1998); and *Howard v. AOL*, 208 F.3d 741 (2000). A fourth case, *U.S. v. Motto* (70 F. Supp. 2d 570), does not use the definitions; the defendant referenced § 230(c) in a Sentencing Memorandum he submitted, stating AOL's immunity from liability was unfair.

[91] 208 F.3d 741. Howard et al. sued for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), violations of the Communications Act of 1934, false advertising, fraud and deceit, negligence, unfair business practices, and declaratory and injunctive relief. The court said Howard could not support RICO claims, and AOL did not show a pattern of racketeering. It also said that AOL was not a common carrier under the Communications Act.

[92] *Id.* at 753.

[93] These cases are *Southwestern Bell Telephone v. FCC*, 153 F.3d 544 (1998); *MediaOne v. County of Henrico, Virginia*, 97 F. Supp. 2d 712 (2000); and *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (2000).

[94] 12 F. Supp. 2d 1192.

Court for Kansas denied a petition for an injunction to keep DeAngelo from working for the competitor. The court cited § 230(b)(2) in its refusal to issue an injunction.[95]

Another case that showed no broadening of immunity acknowledged the high level of protection given to ISPs through the CDA. In *Columbia Insurance Co. v. Seescandy.com*, an unknown party infringed on a trademark owned by Columbia.[96] In deciding the case, the U.S. District Court for the Northern District of California recognized that people injured by anonymous or pseudonymous people have "little or no hope" of discovering the identity through the ISP.[97] The court also wrote that suing ISPs is "often not productive" because "the ISP lacks the knowledge requisite to be held liable for contributory infringement, or is immune pursuant to section 230(c) of the Communications Decency Act."[98]

A final case that did not broaden immunity merely cited the CDA and the decision in *Reno v. ACLU* in determining whether or not an ordinance restricting the display and operation of video games deemed to be "harmful to minors" was constitutional.[99] In *American Amusement Machine Association v. Kendrick*, the court compared the portions of the CDA invalidated in *Reno* to the ordinance in question.[100] Thus, in this case, the CDA did not play a major role in the court's decision.

Immunity for Non-Traditional ISPs

Courts have ruled that only private sector organizations can claim § 230 immunity; a county library, one court said, cannot be considered a traditional or non-traditional ISP. However, courts have ruled directly and indirectly that non-traditional ISPs could have some degree of § 230 immunity.

---

[95] *Id.*
[96] 185 F.R.D. 573.
[97] *Id.* at 578.
[98] *Id.* The court cited *Zeran* in this passage.
[99] 115 F. Supp. 2d 943, at 960 (2000).
[100] For information on the invalidated portions of the CDA, see *infra* note 11.

Individuals: Immunity

A decision by the U.S. District Court for the District of Connecticut revealed that individuals who provide interactive computer services can receive § 230 immunity in a non-traditional ISP role. In *Marczeski v. Law*, a lawsuit involving charges of fraud, harassment, and defamation in Internet chat rooms, the court stated the following:

> [T]here is no legal basis for imposing any liability on either defendant for any defamatory statements made by others. *See, e.g.*, Communications Decency Act, 47 U.S.C. § 230(c)(1) (creating federal immunity as to any cause of action that would make interactive computer service provider liable for information originating with third-party user of service).[101]

The two defendants in this case did not operate an ISP or provide Internet connections of any kind; rather, they had organized an invitation-only Internet chat room for personal use.[102] Because the plaintiff could not prove that the defendants posted defamatory messages to the chat room, the court ruled the defendants could not be held liable for defamatory statements made by others in the chat room. Thus, the court in this case determined that § 230 protected *individuals* who provided users with access to Internet chat rooms.

Public Libraries: No Immunity

The U.S. District Court for the Eastern District of Virginia restricted libraries from claiming immunity under the CDA in *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*.[103] The library moved for immediate dismissal of a suit seeking an injunction against site-blocking software on library computers. The library claimed absolute immunity under the CDA for installing site-blocking software; however, the court rejected this claim, writing that the library was protected by adoption of policies that required it to block access to certain sites[104]

---

[101] 122 F. Supp. 2d 315, at 327 (2000).
[102] *Id.*
[103] 2 F. Supp. 2d 783.
[104] Citing the CDA, the court said the library could block access to sites featuring "obscenity, child pornography or material harmful to juveniles." 2 F. Supp. 2d 783.

but was not protected in actions taken to implement the policy.[105] In deciding the case, the court looked at the intent of Congress as stated in § 230[106] and in the *Zeran* opinion.[107] Section 230, the *Loudoun* court wrote, seeks "to immunize state regulation of Internet speech by encouraging *private* content providers to self-regulate against offensive material; § 230 was not enacted to insulate government regulation of Internet speech from judicial review."[108] Thus, the CDA did not protect the library, a government-run facility, from being sued.[109]

Companies and Organizations: Potential Immunity

One court decision in the non-traditional ISP area did not directly state that non-traditional ISP companies could receive § 230 immunity, but it suggested the possibility of this type of broadening in the future. The U.S. District Court for the Central District of California decided *Lockheed Martin v. Network Solutions, Inc.* within ten days of the *Zeran* decision.[110] Lockheed Martin sued NSI for allowing another company to register an Internet domain name that allegedly infringed on one of its trademarks.[111] The plaintiffs relied on flea market case precedents to establish NSI's responsibility for the infringement,[112] but the court denied the applicability of these precedents.[113] Although the court employed other factors to decide the case, it made a point to compare and distinguish NSI from ISPs[114] and cited portions of *Zeran*.[115] The

---

[105] *Id.*
[106] *Id.* at 789. Specifically, the court cited § 230(b)(2), the policy of preserving the vibrant and competitive free market of the Internet unfettered by government regulation.
[107] *Id.* at 790. Specifically, the court quoted *Zeran* when it stated, "'Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330.'"
[108] *Id.*
[109] *Id.* Other undecided points of the case came before the 4th Circuit again. The prior decision was reiterated (24 F. Supp. 2d 552, 561).
[110] 985 F. Supp. 949 (Nov. 17, 1997).
[111] At the time of the case, NSI was responsible for assigning all Internet domain names. The domain name assigned allegedly infringed on Lockheed Martin's SKUNK WORKS trademark.
[112] *Hard Rock*, 955 F.2d at 1149, deals with a landlord's liability in landlord/tenant relations. *Fonovisa*, 76 F.3d at 265, extended the landlord's liability as stated in *Hard Rock* to trademark law.
[113] *Supra* note 110, at 962.
[114] *Id.* The court said that NSI is distinct from ISPs because it does not provide storage and communications.
[115] *Id.* The court wrote ISPs "cannot be held liable merely for failing to monitor the information posted on their computer for tortious content. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31."

Central District of California said NSI was not an ISP and did not apply the CDA in this case. However, by raising the question of NSI's qualification as an ISP, the court suggested the possibility that the CDA *might* in some instances apply to Internet services beyond traditional ISPs.

A case filed in the U.S. District Court for the Southern District of New York that has not yet been decided illustrates the potential for growth in immunity for non-traditional ISPs. In August 2000, a 23-year-old student issued a fraudulent press release over Internet Wire, a technology news wire service.[116] Bloomberg.com,[117] an online news site, picked up the release and published online headlines and stories based on the fraudulent information.[118] An attorney filed a class action lawsuit on behalf of a Florida investor against Internet Wire, Inc. and Bloomberg, L.P.[119] While the case has not yet been argued, Bloomberg might attempt to argue that it is protected from suit by the CDA.[120] This research has not located any decided case of an online news service or newspaper being sued for its content;[121] since the courts have not yet ruled on the liability of Internet publishers or information content providers, it is unclear if Bloomberg would be allowed to argue CDA immunity.[122]

Courts in *Ben Ezra, Blumenthal*, and *John Does 1-30* have made the distinction between ISPs carrying third-party content untouched and ISPs modifying content in some way. The 10th

---

[116] *Investor Sues Bloomberg, Internet Wire for Running Bogus Emulex Press Release*, MEALEY'S CYBER TECH LITIGATION REPORT, Sept. 2000, Vol. 2, No. 7. The release stated that the CEO of Emulex Corp. had resigned, that the company's earnings were being restated, and that the Securities and Exchange Commission was investigating the company.

[117] http://www.bloomberg.com/

[118] *Class Action Charges Internet Wire, Bloomberg with Fraud for Emulex Hoax*, E-TRADING ALERT, Sept. 29, 2000, Vol. 1, No. 9, 7.

[119] Id. *Hart et al. v. Internet Wire, Inc. and Bloomberg, L.P.*, No. 00-CV-6571, complaint filed (S.D.N.Y., Sept. 6, 2000). As of July 9, 2001, no trial date has yet been set.

[120] Another possible argument Bloomberg could make is the wire service defense.

[121] Sidney Blumenthal dropped his libel suit against Matt Drudge on May 1, 2001. *Blumenthal v. Drudge* would have been a case in which an online content provider was sued for content. In the previously discussed *Blumenthal v. Drudge and AOL*, the D.C. Circuit only ruled on who would stand suit in the defamation case. The court exempted AOL from suit, but refused Drudge's argument that the U.S. District Court for D.C. had no jurisdiction over him.

[122] See *infra* note 62. Coffee mentioned the CDA in his article on the Emulex hoax, but did not discuss Bloomberg's possible use of the act.

Circuit and the U.S. District Courts for D.C. and the Northern District of Illinois have said liability is different in these scenarios; ISPs have immunity for strictly third-party content, but no immunity for third-party content that they help create, develop, or maintain. Because Bloomberg creates some of its own content and relays other content without editing, Bloomberg could be an information content provider in some instances, and a non-traditional ISP in others. Because it wrote stories based on a fraudulent news release from a third-party, Bloomberg would likely be ruled an information content provider, and as such, would share liability with the writer of the press release.

Discussion and Conclusions

This research has shown that immunity for traditional ISPs, such as AOL, has grown since the *Zeran* decision. The district and circuit courts explicitly created immunity for commercial content in *Blumenthal* and *Ben Ezra*. Courts have also broadened the kind of activities for which ISPs can claim § 230 immunity. The Northern District of Illinois determined Web site hosting activities, either jointly with Internet service or in isolation, are protected from suit in *John Does 1-30*; the Eastern District of Virginia ruled that blocking spam is protected by the Good Samaritan provision of the CDA in *AOL v. Greatdeals.net*.

Courts have not yet ruled directly on § 230 immunity for companies operating as non-traditional ISPs.[123] However, the decision in *Marczeski v. Law*, in which individuals who organized and maintained an Internet chat room received immunity for third-party content, clearly shows that § 230 *can be applied* to individuals or groups other than traditional ISPs, such as AOL. While there is no reported case involving a private-sector company providing services other than connecting subscribers to the Internet, the decisions in *Blumenthal*, *Ben Ezra,* and *John Does 1-30* along with *Marczeski* suggest that a non-traditional ISP company might be given

immunity for activities restricted to unaltered third-party content. The judiciary may have a chance to rule on this issue if the Bloomberg case reaches the U.S. District Court for the Southern District of New York. While some scholarly literature suggests that online newspapers (perhaps in some form of non-traditional ISP capacity) are completely immune from suit, this research finds that there is no legal precedent that allows such immunity.[124]

Throughout the CDA-related litigation since *Zeran*, courts have attempted to determine congressional intent in § 230; they have largely relied on *Zeran* to illuminate the intent. The stated U.S. policy in § 230 – the desire to allow the Internet to operate unfettered by government regulation – has also been an important factor in these decisions. While some judges have plainly stated their beliefs that the liability standard is unfair,[125] they have exercised judicial restraint and upheld the *Zeran* precedent and the legislative policy. However, courts have been judicially active in expanding the kinds of content and activities that fall under § 230 protection.

This research suggests a new paradigm in CDA-related tort claims since *Zeran*. Many scholars have focused CDA criticism on the *Zeran* decision, which removed the distinction between publisher and distributor liability. The *Blumenthal*, *Ben Ezra*, and *John Does 1-30* cases along with the undecided Bloomberg case suggest a new category of Internet tort claims in which plaintiffs seek to make a distinction between an ISP's function as an interactive computer service versus its function as an information content provider. The legal decisions since *Zeran* plainly state that it is possible for an ISP to be found liable for material that it creates or edits jointly or on its own; however, no plaintiff has yet been able to prove that an ISP has assisted in creating third-party content or sued for content the ISP created.

Thus far, ISPs have successfully used § 230 to protect themselves from a growing array of tort claims and Internet-related activities; however, as ISPs continue to offer more value-added

---

[123] The D. Connecticut ruled that individuals who provide interactive computer services receive § 230 immunity. However, the E.D. Va. made it clear that a government organization, such as a library, cannot be deemed a non-traditional ISP.

[124] See *supra* note 26.

services and compete for subscribers, they may start developing more of their own content. ISPs would likely be liable for any content they create. Even AOL agreed in *Ben Ezra* that an ISP could be considered an information content provider (liable for content) in some cases and an interactive computer service (immune from suit) in others.

This research suggests that ISPs will see their CDA immunity vanish for any tort claim resulting from content the ISP creates. If they can be proven to have created content or to have assisted in content development, ISPs can be found liable for Internet content;[126] § 230 offers no explicit immunity to information content providers. While § 230 grants broad protections to interactive computer services for third-party content, ISPs and non-traditional ISPs are not immune from suit for content they create.

---

[125] See especially *Blumenthal* at 51, *supra* note 63.
[126] *Supra* note 78.

The Effects of *Desnick v. ABC:* Creating Boundaries for Surreptitious Newsgathering

By James V. D'Aleo
Doctoral Student
School of Journalism and Mass Communication
Carroll Hall
University of North Carolina at Chapel Hill
Chapel Hill, North Carolina 27599

102-F Shadowood Drive
Chapel Hill, North Carolina 27514
919-968-4241
daleo@email.unc.edu

Presented to Law Division
Association for Education in Journalism and Mass Communication
Washington, DC
August 6, 2001

The Effects of *Desnick v. ABC:* Setting Boundaries for Surreptitious Newsgathering

By James V. D'Aleo
University of North Carolina at Chapel Hill

The 1994 decision in *Desnick v. American Broadcasting Companies* by the Seventh Circuit Court of Appeals was a shift from the way courts previously decided newsgathering cases. While literally adhering to the rule that the media must follow all generally applicable laws, the *Desnick* court protected ABC by using the limitations of the torts involved. This paper examines *Desnick's* effect on newsgathering cases by investigating how later cases used the reasoning found in this case.

Since 1971, courts of the United States have generally decided cases filed against the media over their newsgathering techniques based on the standard set by the U.S. Ninth Circuit Court of Appeals ruling in *Dietemann v. Time, Inc.*[1] In that decision, the court stated, "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[2] Although it never mentioned *Dietemann*, the U.S. Supreme Court gave further strength to this rule in its 1991 decision in *Cohen v. Cowles Media Co.*,[3] which stated that the First Amendment does not protect the media when it breaks generally applicable laws in the course of its newsgathering. Writing for the majority, Justice White wrote that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[4] Essentially, these two cases said that members of the news media have to follow the same laws as everyone else, even if they are in the pursuit of a story.

Thus the Seventh Circuit Court of Appeals' 1995 decision in *J.H. Desnick, M.D., Eye Services v. American Broadcasting Companies*[5] came as a surprise since it gave the media some protection for their newsgathering activities, despite the rule established in *Dietemann* and *Cohen*. Desnick Eye Centers was the subject of a 1993 exposé on ABC's *PrimeTime Live* that uncovered a variety of dishonest practices by the ophthalmologic clinic. The news magazine alleged the clinics were recommending cataract surgery for patients who did not need it, shown through the use of undercover reporters as patients, and tampering with machines designed to diagnose one of the symptoms of cataracts.

---

[1] 449 F.2d 245 (9th Cir. 1971).
[2] *Id.* at 249.
[3] 501 U.S. 663 (1991).
[4] *Id.* at 669.

The company and two surgeons filed a lawsuit against ABC in federal district court for trespass, invasion of privacy,[6] violations of two electronic surveillance statutes, fraud, breach of contract, and defamation. At issue were the accusations of machine tampering, using misrepresentation to get reporters inside clinic offices in Illinois and Wisconsin, the use of hidden cameras and microphones, and ABC's violating its promise to Desnick that the broadcast would be about only one clinic and undercover surveillance or ambush interviews would not be used. The district court dismissed six of the seven claims in 1994.[7]

Writing the unanimous decision for the Seventh Circuit, Chief Judge Richard Posner reversed the dismissal of the defamation charge and sent it back to the district court, but upheld the dismissal of the other claims against ABC's newsgathering techniques. Posner based the decision on a variety of reasons, none having to do with the news organization's rights under the First Amendment.[8] On the trespass claim, Posner found that while the ABC reporters misrepresented themselves by pretending to be patients, their presence inside the private office did not interfere "with the ownership or

---

[5] 44 F.3d 1345 (7th Cir. 1995).

[6] While framed early in the decision as invasion of privacy, the Court of Appeals' decision describes the claim as "embrac[ing] several distinct interests, but the only ones conceivably involved here are the closely related interests in concealing intimate personal facts and in preventing intrusion into legitimately private activities." *See id.* at 1353. The description makes the invasion of privacy claim akin to the intrusion upon seclusion claims described in later cases.

[7] Desnick v. Capital Cities/ABC, 851 F. Supp. 303 (N.D. Ill. 1994). The claims were dismissed for a variety of reasons. The court found no claim on which relief could be granted on trespassing; no harm came from the invasion of privacy itself; the reporters did not intend to commit a tort when recording the conversations, which is needed to sustain federal or state wiretapping claims; fraud could not be sustained because the court found the "patients" would have still been allowed access to the premises even without the promise of no ambush interviews; and taking out any "false and defamatory" statements would not have changed the negative connotations of the story. The breach of contract claim was upheld, but was dropped by the plaintiffs prior to the cases reaching the Seventh Circuit Court of Appeals.

[8] The only time Posner mentioned the First Amendment is in the final paragraph of his opinion, alluding to the protection given to the media in defamation suits as a way to protect the market of ideas and opinion. *See* Desnick, 44 F.3d at 1355.

possession of land," the rights protected by trespass law.[9] There was no invasion of privacy because the taping did not reveal any intimate, personal facts.[10] Recording conversations would have violated federal and state wiretapping statutes only if ABC's purpose was to commit a crime, tort, or other injurious acts, which Posner found was not the case in this instance.[11] For the fraud claim to have succeeded, the plaintiffs needed to show that whatever misrepresentations ABC made were within a larger, overall scheme to defraud. Posner found that ABC's quest to expose bad practices by the clinics did not constitute such a scheme, thereby dismissing the fraud claim.[12]

The purpose of this paper is to investigate what influence, if any, the *Desnick* decision had on later newsgathering cases. While citing the precedents in *Dietemann* and *Cohen*, Posner still managed to provide ABC protection for its newsgathering practices by using the limitations of the torts involved. Some scholars predicted *Desnick* would have a tremendous influence on later newsgathering cases because it provided the media with some protection under the law, but did not allow reporters to act however they please. Only through an investigation of how later newsgathering cases use *Desnick* can this influence be determined.

Literature Review

In the *Desnick* decision, Posner freed ABC from liability through a narrow reading of tort law, choosing to emphasize the limitations of each tort. For each of the

---

[9] *Id.* at 1353.
[10] *Id.*
[11] *Id.* at 1353-54.
[12] *Id.* at 1354-55. Posner made the point that the plaintiff may have had a viable claim for breach of contract, since ABC had promised Desnick there would be no ambush interviews or undercover recordings.

claims against ABC, Posner found that the reporters' actions did not rise to the level of sustainable claims. The literature agreed that Posner took an expansive view of each tort's limitations to protect the media, with one article suggesting that Posner went out of his way to protect ABC's newsgathering techniques, while literally following the *Cohen* precedent.[13]

The way undercover investigative stories are created makes using state tort law to decide newsgathering cases preferable to a national standard, according to David A. Logan. He explained that unlike defamation claims, which can happen anywhere by accident, undercover investigations that give rise to newsgathering torts are planned out in advance and usually take place in only one state.[14] Since news organizations have the opportunity to learn state law prior to starting the investigation, there is not a pressing need to create national standard for newsgathering torts.[15] Tracy Dreispul disagreed with that point, stating that because the media has become more national, it needs a uniform standard to combat the unpredictable nature of decisions from different jurisdictions.[16]

Charles C. Scheim wrote that Posner's approach in *Desnick* provides a bright-line standard for the media, which allows that reporters have different reasons than the general public for acting in ways that may violate certain torts.[17] Scheim, however, did not suggest that the media be granted complete immunity. If a media organization were

---

The Seventh Circuit did not consider the claim because the plaintiffs voluntarily dismissed it before it reached this level. *See id.* at 1354.

[13] Matthew Bunker, Sigman L. Splichal, and Sheree Martin, Article, *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 Comm. L. & Pol'y 273, 284 (1999).

[14] David A. Logan, Article, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 Iowa L. Rev. 161, 203-04 (1997).

[15] *Id.* at 204.

[16] Tracy Dreispul, Article, *Circumventing Sullivan: An Argument Against Awarding Punitive Damages for Newsgathering Torts*, 103 Dick. L. Rev. 59, 76 (1998).

[17] Charles C. Scheim, Comment, *Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 St. John's L. Rev. 185, 213 (1998).

to violate a right protected by the tort, such as "the ownership or possession of land" for trespassing mentioned in the *Desnick* decision, then it should be held accountable; otherwise, such organizations should have some immunity against these claims.[18] Bunker et. al. took a stronger approach, suggesting that the First Amendment should protect the media from claims under newsgathering torts, since many of these claims are advanced in order to inhibit a free press.[19] At the other end, Randall P. Bezanson wrote that when the press is sued for its newsgathering methods, it bears the burden of proving that the tort law in question should not be applied to their particular case.[20] His proposal did not suggest that there are no cases when media organizations should be protected; he only stated that the media must prove an exception to liability on a case-by-case basis.[21]

Although not part of Posner's reasoning in *Desnick*, limiting the damages plaintiffs could receive under newsgathering claims is another way courts could protect the media by using tort law. Several authors suggest that by limiting the possible awards, normally done by preventing plaintiffs from receiving punitive damages, the media would still be held accountable for their actions, but protected from the monetary judgments that would prevent them from covering important stories. Scheim stated that allowing only compensatory damages best provides this balance between media and individual rights.[22] Logan also contended that limiting recovery would prevent the scale from tipping in one direction or the other.[23] Allowing only actual damages would still deter the media from going too far, Dreispul wrote, because the possibility of facing

---

[18] *Id.*
[19] Bunker, et. al., *supra* note 13, 295.
[20] Randall P. Bezanson, Article, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering By the Press*, 47 Emory L.J. 895, 908 (1998).
[21] *Id.* at 924.
[22] Scheim, *supra* note 17, 208.

liability would force it to decide whether the story is worth the cost.[24] Roy S. Gutterman agreed, based on this balancing theory, that the media should have to pay for the actual damages caused by their newsgathering.[25] Dynn Nick didn't completely exclude the possibility of awarding punitive damages, but would require plaintiffs to prove actual malice, as in libel cases, in order to receive them.[26] Andrew B. Sims considered the issue of damages under the First Amendment, stating that courts should "recognize a First Amendment immunity from excessive damages,"[27] which most likely would prevent courts from allowing large punitive damage sums.

John J. Walsh, et. al. disagreed with the idea that damages in newsgathering cases should be limited. Since reporters plan to publish the information they gather through surreptitious methods, Walsh found that any damage caused by such publication is a foreseeable consequence of gathering the material.[28] For that reason, he wrote that courts should allow publication damages in newsgathering claims because such damages are proximate to the actual tortuous act,[29] reasoning that goes against Posner's in *Desnick*. A

---

[23] Logan, *supra* note 14, 221.
[24] Dreispul, *supra* note 16, 86.
[25] Roy S. Gutterman, Note, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 Syracuse L. Rev. 197, 246 (2000).
[26] Dynn Nick, Note, *Food (Lion) For Thought: Does the Media Deserve Such Special Protection Against Punitive Damage Awards When It Commits Newsgathering Torts?*, 45 Wayne L. Rev. 203, 227 (1999).
[27] Andrew B. Sims, Article, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U.L. Rev. 507, 514 (1998). Sims' proposal would seek to eliminate injuries to reputation as compensatory damages, limit the compensatory damages to actual damages, and a prohibition against punitive damage awards. *See*, Sims at 530.
[28] John J. Walsh, Steven J. Selby and Jodie L. Schaffer, Symposium, *Undercover Newsgathering Techniques: Issues and Concerns: Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 Wm. & Mary Bill of Rts. J. 1111, 1136 (1996).
[29] *Id.* at 1141.

theory like this would show Nathan Siegel was correct when he stated that the goal of all newsgathering suits is to punish the publication of information harmful to the plaintiffs.[30]

There appears to be an advantage to using a narrow reading of tort law in these types of cases based on the analysis in the literature. By allowing plaintiffs to seek some recompense should the media violate tort law during its newsgathering, the courts can ensure that the public will feel they are protected from overaggressive journalists, ensuring they maintain a sense of privacy. Investigative journalists would still have the opportunity to gather news surreptitiously, but would be held accountable if they crossed the lines set by each state. Under this theory, both plaintiffs and journalists will have their rights protected.

Research questions and methodology

This paper explores the effect of *Desnick* on newsgathering cases decided since 1995. More specifically, the following questions will be addressed:

- How many newsgathering cases since 1995 cited *Desnick?*
- What types of claims were brought against the media in these cases?
- On what issues did the courts apply *Desnick*?
- What were the results?

Using the traditional legal research method of case analysis, this paper examines all the reported cases dealing with claims based on how the media gathered news on private property in both the state and federal courts that cited *Desnick*. For those cases in which

[30] Nathan Siegel, Panel One, *Newsgathering and Privacy Rights: Commentary*, 1999 Ann. Surv. Am. L. 207, 212-13.

there are decisions at successive levels of the court system, this paper examines the highest court's decision since those would provide the strongest precedent.

Desnick in newsgathering cases

Forty-six separate cases cited *Desnick,* but only five deal with surreptitious newsgathering on private property.[31] *Desnick* was binding law in only one of the cases; four decisions came from other jurisdictions. Each of the five cases dealt with a wide variety of claims leveled by owners or employees of private businesses. Those appearing most often, each three times, were fraud, trespass and intrusion. In two cases, the plaintiffs claimed the media defendants violated federal and/or state wiretapping laws. Other claims included breach of duty of loyalty, unfair trade practices, intentional interference with prospective business relationships, interference with contractual relations and false light invasion of privacy.

The courts involved did not use *Desnick* to adjudicate every issue. *Desnick* was used in the analysis of four major issues: whether valid consent to being on private property can come through misrepresentation, trespass claims based on the reporters' presence on private property, intrusion claims based on the information gleaned from the recorded conversations, and wiretap/eavesdropping claims based on the actual act of recording. The following sections discuss *Desnick's* impact on these issues.

---

[31] Russell v. American Broadcasting Company, 23 Media L. Rep. 2428 (1995); Medical Laboratory Management Consultants v. American Broadcasting Companies, 30 F. Supp. 2d 1182 (D. Ariz. 1998); Sanders v. American Broadcasting Companies, 978 P. 2d 67 (1999); Food Lion v. Capital Cities/ABC, 193 F.3d 505 (4th Cir. 1999); and American Transmission, Inc. v. Channel 7 of Detroit, 609 N.W.2d 607 (2000). The cases were searched on March 1, 2001.

Consent based on misrepresentation

Gathering information surreptitiously would not succeed without some misrepresentations by the reporters. It is very unlikely that the targets of these types of investigations would voluntarily give reporters information that would put themselves in disrepute. Therefore, if undercover reporting is to continue, reporters need to disguise their identities and purposes when investigating certain stories. Using the example of a restaurant critic, Posner stated in *Desnick*, "The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent."[32] The three cases looking at this issue dispute whether consent gained in this manner is valid, despite Posner's analysis.

The first case addressing this issue was *Medical Laboratory Management Consultants v. American Broadcasting Companies*, which resulted from a story that aired in 1994 on ABC's *PrimeTime Live*. Robbie Gordon, an employee of the television show, called the plaintiffs, John and Carolyn Devaraj, the owners of a medical laboratory in Arizona. Claiming to be interested in starting a laboratory in Georgia, Gordon set up a visit to find out what was involved in running such an operation. Devaraj gave Gordon and Jeff Cooke, another undercover ABC employee, a tour of the facility, while answering questions along the way. Cooke filmed and recorded the entire tour without Devaraj's knowledge. ABC later used the footage in a story that discussed frequent errors in pap smear testing done at the laboratory. The Devarajs filed suit in federal

[32] *See Desnick*, 44 F.3d at 1351.

district court in Arizona, which immediately dismissed six claims against ABC.[33] The court did hear claims of intrusion, fraud, interference with contractual relations, trespass, and eavesdropping against ABC.[34]

In its decision, the district court stated that neither the law in Arizona nor the Ninth Circuit supports the idea that consent procured by misrepresentation has validity.[35] Since no trespassing cases in Arizona dealt with this issue, the court based its analysis on battery cases.[36] Based on these cases, the court ruled that ABC could be held liable because Devaraj consented only to the reporters (even though he didn't know their true identities) being on the premises, not to videotape the conversations and tour.[37] Although ABC lost on this issue, the court did grant its motion for summary judgment on the trespassing claim for other reasons.[38] This ruling indicates that the introduction of an undercover reporter does not necessarily translate into a trespass claim. The line drawn appears to be when the reporters take father actions that the target of the investigation would not normally allow if they knew the truth.

The next case, *Food Lion v. Capital Cities/ABC*, came about through another *PrimeTime Live* exposé, this time an investigation of the meat-handling practices of the Food Lion supermarket chain in North and South Carolina. In order to investigate the

---

[33] Matter of Medical Laboratory Management Consultants, 931 F. Supp. 1487 (D.Ariz. 1996). The six claims dismissed were public disclosure of private facts, intention infliction of emotional distress, unfair trade practices, trade libel, negligent infliction of emotional distress, and conspiracy.

[34] Intrusion upon seclusion is defined by the District Court of Arizona as "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." *See Medical Laboratory*, 30 F. Supp. 2d at 1187. (quoting Hart v. Seven Resorts, 947 P. 2d 846, 853 (Ariz. App. 1997)). Trespass is defined as "any unauthorized presence on another's personal property." *See Medical Laboratory*, 30 F. Supp. 2d at 1201. (quoting State ex. rel. Purcell v. Superior Court In and For Maricopa County, 535 P. 2d 1299, 1301 (Ariz. 1975)).

[35] *Id.* at 1203.

[36] *Id.*

[37] *Id.* at 1204.

story, ABC sent two undercover reporters to apply for jobs at two different stores using falsified applications. After being hired by the stores, which were not aware of the individuals' true backgrounds, the reporters used hidden cameras and microphones to record footage of the meat department. ABC broadcast some of the material as part of a November 5, 1992, broadcast of *PrimeTime Live*, showing how Food Lion employees mishandled meat and fish. Food Lion sued ABC, the *PrimeTime Live* producers and the reporters in federal district court for fraud, breach of the duty of loyalty, trespass and unfair trade practices. At no time did the supermarket chain ever dispute the facts contained in the story. The jury found ABC liable for fraud and the reporters liable for breach of the duty of loyalty and trespass. The district court also found the defendants violated the North Carolina Unfair and Deceptive Trade Practices Act. Before the damages stage, the court ruled that damages to Food Lion allegedly incurred from the broadcast could not be recovered because the damages were not proximately caused by the acts attributed to ABC.[39] The jury awarded Food Lion $1,400 compensatory damages for the fraud, and $1,500 on the UTPA claim,[40] as well as $1 from each reporter for breach of duty of loyalty and trespass. The jury also awarded $5,545,750 in punitive damages, lowered to $315,000 by the judge. Both sides appealed to the Fourth Circuit Court of Appeals.

In the host of claims argued before the Fourth Circuit, the court only used *Desnick* with regards to the trespass claim, specifically whether the reporters exceeded the scope of Food Lion's consent to be on the premises. Although the trespass claim against the

---

[38] The court granted ABC's motion for summary judgment on the trespass claim because no damages were caused by the trespass itself. *See id.* at 1204.
[39] Food Lion v. Capital Cities/ABC, 964 F. Supp. 956, 958 (M.D.N.C. 1997)
[40] Food Lion chose to drop these damages in favor of the fraud damages.

reporters was ultimately upheld because the court found they planned to commit another tort—breach of duty of loyalty—when they took jobs at Food Lion,[41] the Fourth Circuit supported *Desnick's* reasoning about consent. As stated above, the reporters falsified their job applications in order to be hired by the supermarkets. Discussing this action, the court stated, "[W]e have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work."[42] In addition, it used *Desnick's* reasoning by stating that should they find the consent was not valid, it "would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land."[43] In other words, sustaining a trespass because the consent was not valid would serve no real purpose. This rule has taken some hold, as the Michigan Court of Appeals cited both *Food Lion* and *Desnick* made the same point in sustaining the dismissal of a trespass claim in *American Transmission, Inc v. Channel 7 of Detroit*, a case that will be examined in more detail below.

The idea that consent can be gained through misrepresentation is not something that courts seem to be willing to grant media organizations easily. However, if no damage occurs from the misrepresentation, which was brought up in connection to trespass claims in these three cases, the consent can be allowed to stand. As *Medical Laboratory* shows, not every court has accepted this theory. Until more cases address this issue, media organizations have to be aware that even just reporters misrepresenting their purposes or identities to gain access to private property can give rise to successful claims against them.

---

[41] *See Food Lion*, 193 F.3d at 519.
[42] *Id.* at 518.

Where the taping took place

Three cases use *Desnick* to discuss the impact of the location of the reporters' recording on newsgathering claims. In *Medical Laboratory*, *Sanders*, and *American Transmission*, the courts began outlining some basic boundaries for protecting undercover newsgathering methods within places of business. The cases show that where the taping occurred determines the amount of protection the media defendant receives.

Among post-*Desnick* cases, a discussion of location first appeared in deciding the intrusion and trespass claims in *Medical Laboratory*. The district court considered *Desnick* when analyzing the level of offensiveness of the alleged intrusive act, one of the factors in determining whether an intrusion has occurred.[44] Before reaching the immediate case, the court examined the meaning of "highly offensive to a reasonable person."[45] In defining this term, the court made a point that favored media outlets in their newsgathering efforts: "[T]he public's interest in the news and the absence of less invasive methods of reporting the story may mitigate the offensiveness of the intrusion."[46] Adding that not all newsgathering activity is protected, the court found that the offensiveness could be greater if "the intrusion is gratuitous, threatens the safety of anyone involved, or unnecessarily intrudes on a target of the news in his private capacity."[47] The need for such recordings for a legitimate news purpose—investigating erroneous pap smear readings—and the obvious lack of danger in taping the

---

[43] *Id.*
[44] The court had previously found that the location of the conversation precluded calling it an intrusive act based on a lack of a reasonable expectation of privacy, but did not use Desnick for that analysis. *See Medical Laboratory*, 30 F. Supp 2d at 1189.
[45] *Id.*
[46] *Id.* at 1190.

conversations took care of the first two possible claims of offensiveness, but the court used *Desnick* to rule on the third part. The court distinguished this case from *Dietemann*—a binding precedent for this district court—by using *Desnick's* reasoning that since the claims in *Dietemann* were based on taping in a private home, it differs from taping in a place of business in terms of the level of offensiveness.[48] Since this taping took place at Devaraj's business and had nothing to do with his home or private life, the alleged intrusion could not be considered highly offensive.[49]

While the *Medical Laboratory* court used *Desnick* to find an intrusion claim could not stand because the taping took place in a workplace, the court distinguished this case from *Desnick* on the trespass claim. *Desnick* showed that a trespass ruling is not automatic in cases where consent to be on a property was gained through misrepresentation.[50] The *Medical Laboratory* decision did not follow this reasoning. As stated earlier, neither Arizona nor Ninth Circuit law supports this idea, but the Arizona district court gave the impression that different facts may have changed the outcome. In a footnote, Judge Silver wrote, "It is unclear whether the outcome in *Desnick* would have been the same if the videotaping had taken place in a semi-private office, as in the instant case, rather than a public eye clinic…Because the portion of Medical Lab that Mr. Cooke and Mr. Gordon entered was semi-private, *Desnick* may also be distinguished on factual grounds."[51] This statement appears to acknowledge that there is a difference between a semi-private area and areas of a private business where the public has access.

---

[47] *Id.*
[48] *Id. at* n.8.
[49] *Id.* at 1190-91.
[50] *See Desnick*, 44 F.3d at 1351.
[51] *See Medical Laboratory*, 30 F. Supp. 2d at 1203 n.22.

In *Sanders v. American Broadcasting Companies*, the Supreme Court of California also disagreed with *Desnick's* analysis, choosing to set additional boundaries on the news media. In another *PrimeTime Live* story, an ABC reporter applied for a job and was hired by the Psychic Marketing Group. During her employment at PMG, the reporter wore a hidden camera and microphone to record conversations with her co-workers. Two of the conversations taped were with Mark Sanders, who sued for invasion of privacy by intrusion and violation of Penal Code section 632 for confidential communications after the tape was aired. While ABC won at trial on the section 632 violations, the jury found the defendants liable for invasion of privacy by intrusion and ordered them to pay compensatory damages of $335,000 and punitive damages of $300,000. The California Court of Appeals reversed the jury's verdict, citing that Sanders could not have a reasonable expectation of privacy in the workplace.[52]

Sanders discussed *Desnick* only briefly, but alluded to the impact of where the taped conversations took place. Prior to placing *Desnick* in its framework, the court decided that an individual could reasonably expect privacy against recorded conversations despite being in a workplace area where co-workers could overhear the conversations.[53] This statement provides the basis for the California Supreme Court to distinguish *Sanders* from *Desnick*. Anybody could have walked into the clinic involved in *Desnick*; in *Sanders*, only employees were allowed in the areas where the conversations were recorded. While the court's reversal of the Court of Appeals' dismissal of the intrusion claim rested on other factors, one of which also involved

---

[52] *See Sanders*, 978 P. 2d at 71.
[53] *Id.* at 73-74.

Desnick, this case shows that businesses are allowed to have private areas where employees can expect to be free from undercover reporters taping their conversations.

The only one of these cases to follow *Desnick* exactly on this issue was *American Transmission*. Unlike the other newsgathering cases citing *Desnick*, this case deals with a local television station, not *PrimeTime Live*. Joe Ducey, a consumer reporter for Channel 7 of Detroit, received a tip from a consumer advocacy group about the high number of complaints about transmission repair shops. In order to investigate and air the story, Ducey had Evelyn Stern, a member of the group take a car, certified to be in working order except for an easily-seen disconnected hose, to various transmission repair shops to record the shops' actions with a hidden camera. Among the shops that missed the easily fixed problem was American Transmissions of Troy, which recommended taking apart the entire transmission. After the story aired in early 1997, American Transmissions filed suit in state court alleging defamation, fraud, trespass, and intentional interference with prospective business relationships. The trial court judge summarily dismissed the claims, moving American Transmissions to appeal to the Court of Appeals of Michigan.

In addressing the trespass claim against the television station, the Michigan Court of Appeals cited *Desnick* extensively in deciding whether this type of surreptitious newsgathering constituted a trespass. The court was very clear that the location of the taping plays a role in whether a trespass claim can be sustained. A trespass claim could not stand in this case, the court said, because Stern entered only those portions of the business that was open to the public and "did not disrupt the shop or invade anyone's

private space."[54] Since she remained in the public area of this business, the prior dismissal of the trespass claim stood.

While only in the beginning stages, these three cases show courts are drawing clear boundaries as to where undercover filming can take place. Utilizing *Desnick's* reasoning, these three different courts determined that surreptitious newsgathering in a place of business is different than that in a residence. In addition, hidden filming is acceptable in public areas, but is less so when it is in a private or semi-private area. Going behind closed doors to get a story may leave media organizations liable for damages, even if the doors do not lead to someone's home.

Type of conversation

With some torts, the type of conversation the media recorded can determine the ultimate decision. Four cases—*Russell, Medical Laboratory, Sanders,* and *American Transmission*—used *Desnick* in justifying their decisions to set boundaries on the media on this issue.

The earliest of the cases in this study, *Russell v. American Broadcasting Company,* was decided four months after the *Desnick* decision. In this case, the plaintiff, Marilyn Russell, was the manager of the Potash Brothers grocery store in Chicago. An ABC reporter went undercover as an employee, wearing a hidden camera and microphone, to gather information about sanitation problems in the commercial fish industry to air as part of story on *PrimeTime Live*. The 1994 story used clips of Russell giving instructions to the reporter about how to discuss freshness of the fish to customers

[54] *See American Transmission,* 609 N.W.2d at 614.

and telling the reporter to cook old fish to be resold.[55] Russell sued the network for violations of the federal wiretap stature, false light invasion of privacy and intrusion upon seclusion.

The district court dismissed the intrusion claim, because the Illinois Supreme Court has never recognized such a tort.[56] However, the decision added that even if such a claim were available in Illinois, it would fail due to the reasoning in *Desnick*.[57] Judge Leinenweber, writing the decision in *Russell*, stated that taping conversations with a co-worker did not constitute "offensive prying" into private information.[58] With the Seventh Circuit Court of Appeals' decision in *Desnick* acting as a binding precedent for this district court, it should not be surprising that *Russell* followed that decision closely. What should be noted, however, is that *Russell* did not find any difference between doctor-patient conversations, like in *Desnick*, and those between co-workers, a distinction *Sanders* would later make.

The district court in *Medical Laboratory* only briefly mentioned *Desnick* and the type of conversation involved when ruling on the intrusion claim, which brought *Desnick's* reasoning outside of the Seventh Circuit. In the immediate case, the court cited *Desnick* in writing, "When courts have considered claims in the workplace, they have generally found for the plaintiffs only if the challenged intrusions involved information or activities of a highly intimate nature."[59] Stating that the recorded conversations remained within the realm of the laboratory industry as a whole and Medical Laboratory's

---

[55] In the story, Russell tells the reporter "always to tell customers that the fish is 'today fresh,'" and tells the reporter "that fish too old to be sold as 'fresh' can still be cooked and then sold." *See Russell*, 23 Media L. Rep. at 2429.
[56] *Id.* at 2433.
[57] *Id.* at 2434.
[58] *Id.*

practices, while also acknowledging that Devaraj may not have shared the information "if he knew they [the reporters] were recording his conversation for publication." Judge Silver decided that the information did not involve anything personal to warrant a successful intrusion claim.[60] It appears, in Arizona at least, as long as the conversations stay within the bounds of business, the recordings will not be considered intrusive.

As stated above, the California Supreme Court distinguished *Desnick* from its decision in *Sanders* because the taped conversations took place in an area of the business that was only open to employees. The conversations involved further separated the two cases. Citing *Desnick's* characterization that the doctor-patient relationship is equivalent to that of a service provider and a customer and that these are "essentially conversations between strangers," the court ruled that such reasoning was inapplicable in this case.[61] This case, as mentioned above, dealt with conversations between a reporter posing as an employee and a co-worker. The more familiar relationship of the participants makes that recording more intrusive than *Desnick*.

In deciding *American Transmission*, the Michigan Court of Appeals combined the location and type of conversation as well. For that reason, the court only briefly discussed the type of conversation involved. In case facts that are more akin to *Desnick* than *Sanders*, the videotaped conversations consisted of an "employee [of the business] engaging in professional discussion with [Stern]."[62] Since "the videotape she made did not reveal the intimate details of anybody's life," the Court of Appeals found that the trial

---

[59] *See Medical Laboratory*, 30 F. Supp. 2d at 1188.
[60] *Id.* at 1189.
[61] *See Sanders*, 978 P.2d at 76-77.
[62] *See American Transmission*, 609 N.W.2d at 709.

court was correct in dismissing the trespass claim,[63] a decision that followed *Desnick* exactly.

If future cases continue to follow this pattern, a clear line appears to have been set about which conversations can and cannot be taped. Those conversations between a proprietor and a client discussing a service or an outsider and a proprietor discussing business practices have been upheld, while conversations between co-workers have not. The line has been based on the level of familiarity involved. Intimate, personal facts are more likely to be discussed among co-workers, which is why they will be more actionable than conversations between strangers.

Reason for taping conversations

While other issues involved with surreptitious newsgathering are clouded in a measure of uncertainty, the fact that two district courts used the same arguments in ruling on claims under the Wire and Electronic Communications Interception and Interception of Communications Act[64] makes it clear that such claims could be dispatched in the same way. In both cases—*Russell* and *Medical Laboratory*—the plaintiffs claimed the use of hidden cameras and microphones to gather material for the news stories violated this federal statute. Both district courts—Illinois and Arizona, respectively—used the reasoning in *Desnick* to deny the claims and rule in favor of the media defendants.

The plaintiffs in *Russell* claimed that ABC violated the consent exception of the wiretap statute, which allows an individual to tape his or her own conversations, because

---

[63] *Id.*
[64] 18 U.S.C. § 2510-2522 (1995).

the "defendants' conduct was both criminal and tortious [sic]."[65] The court said that *Desnick* instructs it how to rule on this particular issue, despite the fact that the tortuous action claimed in this case was false light invasion of privacy rather than defamation.[66] The court found that the true issue involved is not the methods ABC used in gathering news; it is why ABC taped the conversations in the first place.[67] ABC's purpose was to "expose sanitation problems in the commercial fish industry,"[68] which is considered a legitimate enterprise. The reporters did not tape the conversations in order to commit a tort, a point even the plaintiffs conceded, even though false light invasion of privacy and intrusion claims were later filed.[69] Since the reporters had a legitimate purpose in recording these conversations, the consent still exception applies and the wiretapping claim was dismissed.[70]

Medical Laboratory followed the same reasoning by citing the distinction between recording conversations to commit a tort and a tort possibly resulting from the recordings. Discussing this issue, the district court said, "This distinction is significant, for without it the media could be held liable for undercover reporting under § 2511 even when their sole intent was to gather news."[71] The court cited *Desnick* and *Russell* in stating that the main issue is the reason why the recordings were made, not how the defendants used them.[72] The ABC reporters recorded the conversations in order to gain material for their story, not for some tortuous purpose. The court also pointed out that the Devarajs did not offer any evidence to explain why ABC would have recorded the

---

[65] *See Russell*, 23 Media L. Rep. at 2429.
[66] *Id.* at 2431
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

meeting other than that legitimate newsgathering purpose.[73] Without such evidence, ABC's motion to dismiss the eavesdropping claim was granted.[74]

Two cases can only suggest the beginning of a trend, not show a standard legal rule. However, both cases that cited *Desnick* in wiretapping/eavesdropping claims followed its reasoning to the letter. The mere act of recording conversations cannot give rise to successful federal wiretap claims when the media uses them for its newsgathering purposes; a claim can only succeed if the plaintiffs can prove the reporters planned to use the recordings to commit a tort. Since it will be very rare that members of the media will voluntarily seek out a lawsuit by planning tortuous acts in advance, it will be very rare for a plaintiff to win this type of claim.

Conclusion

A dearth of cases makes the effects of *Desnick* unclear. Only five cases of surreptitious newsgathering on private property cited *Desnick*, each dealing with a variety of claims. The three main claims brought by the plaintiffs against media organizations were trespass, intrusion, and federal wiretapping. While there aren't enough cases to make broad generalizations, early indications suggest that the courts have begun to set boundaries as to what reporters can and cannot do when using surreptitious methods to investigate a story. In some instances, reporters are protected when they misrepresent their identities and purposes to gain access to businesses provided they don't violate the purpose behind the tort the plaintiff may allege. Reporters receive more protection when

---

[71] *See Medical Laboratory*, 30 F. Supp. 2d at 1205.
[72] *Id.* at 1205.
[73] *Id.* at 1206.
[74] *Id.*

they infiltrate businesses than homes, but only in those portions of the business where the general public has access. The media are protected when the recorded conversations are between a proprietor and a customer, but may not be when they are between co-workers. Finally, the decisions suggest that the media are protected from wiretap claims as long as the conversations are related to a legitimate newsgathering purpose.

The courts have not been willing to grant complete protection to the media's surreptitious newsgathering. They have shown, however, that each case will be examined separately in order to create a framework of protection. With the U.S. Supreme Court mostly staying out of the discussion, lower-lever courts are creating this framework, meaning that these decisions won't be binding everywhere. Without some kind of agreed-upon national framework, media organizations need to be careful about where they undertake their undercover investigation. Right now, what may be acceptable in one area may not be in another.

Updating SPJ's Report on the Journalist's Privilege: Three Years Later, Is the Privilege Truly Eroding?

Anthony L. Fargo
Visiting Assistant Professor of Communication
University of Nevada, Las Vegas

Hank Greenspun School of Communication
4505 Maryland Parkway
Box 455007
Las Vegas, NV 89154
Phone: (702) 895-1373
Fax: (702) 895-4805
E-mail: tfargo19@earthlink.net

1770 N. Green Valley Parkway
Apt. 2824
Henderson, NV 89014
Phone: (702) 407-5644
Cellular: (401) 481-7402

Law Division
AEJMC National Convention
Washington, D.C.
August 5-8, 2001

Acknowledgment

The author wishes to thank the URI Foundation at the University of Rhode Island, whose funding helped make the research for this project possible.

Abstract

**Updating SPJ's Report on the Journalist's Privilege:
Three Years Later, Is the Privilege Truly Eroding?**

Anthony L. Fargo
Visiting Assistant Professor of Communication
University of Nevada, Las Vegas

The Society of Professional Journalists issued a report in 1997 called "The Erosion of the Reporter's Privilege." The report said that judicial support for the journalist's privilege appeared to be wavering, citing recent cases and expert commentary. This study found that appeals and legislation had reversed the effects of many of the decisions cited. However, the report's finding that the judiciary was becoming more hostile to journalists was supported by judges' comments in recent cases.

Updating SPJ's Report on the Journalist's Privilege:
Three Years Later, Is the Privilege Truly Eroding?

Introduction

In 1997, the Society of Professional Journalists (SPJ) issued a report called "The Erosion of the Reporter's Privilege."[1] The report warned that judicial support for the journalist's privilege against forced disclosure of confidential and nonconfidential information to courts, grand juries, and other bodies appeared to be slipping. The report noted a number of recent developments in privilege law and quoted experts who said the recent pattern of journalists' losses in court could be the start of a trend away from protecting journalists' sources and unpublished information from forced disclosure.

However, in the next two years, nearly all of the cases cited were reversed or legislation was passed in response to the cases that appeared to strengthen the privilege. It would be easy, therefore, to look back at SPJ's report as a premature call to arms or an accurate view of a brief moment in time that had passed.

It would not be wise to dismiss SPJ's warning lightly, however. At best, developments in privilege law since 1997 in the federal and state courts and state legislatures present an uneven picture. While SPJ may have been premature in determining that some of the cases it cited were losses for the media, its overall theme of calling attention to an increasing official hostility to the media may have been accurate. The report's concern about increasing judicial hostility to the press may been its most important insight into the future of privilege law.

This paper will examine the SPJ report on journalist's privilege in an attempt to update its findings and to determine whether the report remains a viable warning about a legal trend that

---

[1] Although SPJ used the term "reporter's privilege," this paper will use the term "journalist's privilege" instead. Journalist's privilege is somewhat more accurate because not all media personnel who are subpoenaed to disclose information gathered on the job are reporters. Some are photographers, editors, and camera operators.

could seriously undermine press rights. First, the paper will briefly discuss the history of the journalist's privilege up to 1997. The next part of the paper will examine in detail what the report said and what evidence it relied upon. Next, the paper will discuss what happened to some of the cases cited in the report after the report was published. Next, the paper will discuss cases, legislation, and commentary after 1997 to determine whether the evidence supports SPJ's finding of increasing judicial hostility to the press. The paper will conclude with a discussion of whether the report remains viable as a warning to journalists and their employers about the future of the journalist's privilege.

A Brief History of the Journalist's Privilege

Although journalists have fought subpoenas from courts and other official bodies since at least the mid-1800s, journalists did not claim a First Amendment right to protect their sources until 1958. In *Garland v. Torre*, the Second Circuit of the U.S. Courts of Appeals rejected a reporter's argument that she should not have to identify her confidential source to a plaintiff in a civil suit in which the reporter was not a party. If she revealed her source, the reporter argued, other sources would not provide information to her or other journalists, which would damage the First Amendment-protected free flow of information to the public. But the court argued that while subpoenas might be unconstitutional in some limited circumstances, in this case the reporter's testimony went to the heart of the plaintiff's case and had to be revealed.[2]

The U.S. Supreme Court has considered the privilege claim only once, in 1972. In *Branzburg v. Hayes*, a 5-4 decision, the Court rejected the claims of three reporters who said they should have a constitutional right to refuse to identify confidential sources to grand juries

---

[2] Garland v. Torre, 259 F.2d 545 (2d. Cir. 1958), *cert. denied sub. nom.*, Torre v. Garland, 358 U.S. 910 (1958).

investigating possible crimes committed by the sources.[3] The Court ruled that the government's interest in fighting crime outweighed any incidental burden on the press created by forcing reporters to honor the same duty to testify that any other citizen would have to honor. However, in a concurring opinion, Justice Lewis Powell noted the "limited nature" of the ruling and suggested that journalists might have valid constitutional claims to a privilege under other circumstances.[4] In dissent, Justice William O. Douglas argued that the First Amendment required that journalists have an absolute privilege barring them from being forced to testify in any situation.[5] Justice Potter Stewart, writing for himself and two other dissenting justices, argued that journalists needed a qualified privilege to protect the free flow of information to the public and the press's traditional autonomy from the government. The government should only be able to force a reporter to testify, Justice Stewart argued, if it could show that the information sought was highly relevant to the case, that there was a compelling need for the information, and that it was not available elsewhere.[6]

The divided nature of the opinion and Justice Powell's limiting concurrence encouraged lower federal courts to recognize a journalist's privilege in other fact situations, even in cases in which journalists had been subpoenaed by grand juries if the grand juries were not investigating specific crimes allegedly witnessed by the journalists. Since 1972, every Court of Appeals except

---

[3] Branzburg v. Hayes, 408 U.S. 665 (1972).

[4] *Id.* at 709-710 (Powell, J., concurring).

[5] *Id.* at 711-725 (Douglas, J., dissenting).

[6] *Id.* at 725-752 (Stewart, J., dissenting).

the Sixth Circuit has recognized a qualified privilege, modeled after Justice Stewart's recommendation, in at least one type of proceeding.[7]

In 1975, a federal district court in Florida extended the privilege to protect nonconfidential information in *Loadholtz v. Fields*, finding that the "chilling effect" of subpoenas on the free flow of information was not limited to just the forced disclosure of confidential information.[8] Since then, the Second, Third, Fourth, and Ninth Circuits of the U.S. Courts of Appeals have recognized a qualified journalist's privilege for nonconfidential information in at least some circumstances.[9]

Just as *Branzburg* could not stop lower federal courts from recognizing a journalist's privilege, it also did not bar states from providing statutory privileges in so-called shield laws. Shield laws had existed since Maryland became the first state to pass one in 1896, and by 1997, twenty-nine states and the District of Columbia had passed such statutes. Most shield laws give

---

[7] *See, e.g.*, Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), *reh'g denied*, 466 F.2d 1090 (9th Cir. 1972) (grand jury); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (libel); Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (civil); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (civil); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 454 U.S. 1056 (1981) (federal privilege exists in both civil and criminal cases); LaRouche v. NBC, 780 F.2d 1134 (4th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (journalists have First Amendment privilege, although it is not absolute); United States v. Lloyd, 71 F.3d 1256 (7th Cir. 1995) (district court did not abuse discretion in quashing subpoena in criminal case); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977) (recognizing privilege and finding that documentary filmmaker could assert it); United States v. Caporale, 806 f.2d 1487 (11th Cir. 1986) (recognizing qualified privilege in criminal case). *But see In* Re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) (denying existence of any First Amendment privilege for journalists).

[8] 389 F.Supp. 1299 (M.D. Fla. 1975).

[9] *See* von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987), *cert. denied sub nom.*, Reynolds v. von Bulow by Auersperg, 481 U.S. 1015 (1987) (federal journalist's privilege applies to both confidential and nonconfidential information but book author in this case could not claim privilege because she was not a journalist); United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981), *cert. denied sub nom.*, Cuthbertson v. CBS, Inc., 454 U.S. 1056 (1981) (subpoenas to CBS for outtakes of interviews with potential witnesses in criminal case should be quashed because defense had not shown lack of alternative sources); Church of Scientology Intern'l v. Daniels, 992 F.2d 1329 (4th Cir. 1993), *cert. denied*, 510 U.S. 869 (1993) (civil plaintiff failed to show need, relevance, and lack of alternative sources for notes of interview with defendant); Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995) (trial court had to determine whether book author's testimony and notes of interview with civil defendant, subpoenaed by plaintiffs, were relevant, necessary, and unavailable elsewhere).

qualified protection to journalists seeking to keep confidential sources and, in some cases, unpublished and nonconfidential information from forced disclosure.[10] In addition, most states without shield laws also have recognized a privilege grounded in the First Amendment or common law.[11]

---

[10] *See* ALA. CODE § 12-21-142 (Michie 1995, Supp. 1998); ALASKA STAT. §§ 09.25.300 to 09.25.390 ((1998); ARIZ. REV. STAT. ANN. § 12-2237 (West 1994, Supp. 1999); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995, Supp. 2000); COLO REV. STAT. § 13-90-119 (Bradford 1999); DEL. CODE ANN. TIT. 10, §§ 4320 to 4326 (Michie 1999); D.C. CODE ANN. §§ 16-4701 to 16-4704 (Michie 1997, Supp. 1998); GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 1999); ILL. COMP. STAT. ANN. §§ 5/8-901 to 5/8-909 (Michie 1993, Supp. 1999); IND. CODE ANN. §§ 34-46-4-1 to 34-46-4-2 (West 1999); KY. REV. STAT. § 421.100 (Michie 1992, Supp. 1999); LA. REV. STAT. ANN. §§ 1451 to 1459 (West 1999, Supp. 2000); MD. ANN. CODE, CTS. & JUD. PRO., § 9-112 (Lexis Law Pub. 1998, Supp. 2000); MICH. COMP. LAWS § 767.5A (West 1982, as amended, Supp. 1999); MINN. STAT. ANN. §§ 595.021 to 595.025 (West 1988, as amended, Supp. 2000); MONT. CODE ANN. §§ 26-1-901 to 26-1-902 (1999); N.M. EVID. RULES § 11-514 (Michie 1994); NEB. REV. STAT. §§ 20-144 to 20-147 (1997); NEV. REV. STAT. § 49.275 (Michie 1996, Supp. 1999); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 1994); N.Y. CIV. RIGHTS LAW § 79-h (West 1992, Supp. 1999); N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 1999); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Banks-Baldwin 1994, Supp. 1999); OKLA. STAT. ANN. TIT. 12, § 2506 (West 1993); OR. REV. STAT. ANN. §§ 44.510 to 44.540 (Butterworth 1988, Supp. 1998); 42 PA. CON. STAT. ANN. § 5942 (West 1982, Supp. 1999); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (1998); S.C. CODE § 19-11-100 (Lawyers Co-Op 1985, as amended, Supp. 1999); TENN. CODE ANN. § 24-1-208 (Michie 1980, as amended, Supp. 1999).

[11] Sierra Life Insurance Co. v. Magic Valley Newspapers, 623 P.2d 103 (Idaho 1981) (lower court should consider newspaper's privilege arguments before ordering disclosure in libel case); In Re Contempt of Wright, 700 P.2d 40 (Idaho 1985) (recognizing confidential-source privilege in criminal case); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977) (privilege exists in civil proceedings but overcome in this case); .State v. Sandstrom, 581 P.2d 812 (Kan. 1978) (limited privilege exists in criminal cases); Sinnott v. Boston Retirement Bd., 524 N.E.2d 100 (Mass. 1988) (tacitly recognizing privilege in civil case); In Re John Doe Grand Jury Invest., 574 N.E.2d 373 (Mass. 1991) (recognizing privilege in criminal grand jury setting); State ex. rel. Classic III Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997) (defendant magazine in libel case not required to reveal confidential sources); Opinion of the Justices, 373 A.2d 644 (N.H. 1977) (recognizing privilege for confidential information in civil case in which journalist not a party); State v. Siel, 444 A.2d 499 (N.H. 1982) (recognizing privilege in criminal case); Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780 (S.D. 1995) (recognizing privilege and ruling for journalist in libel case in which journalist was party); Dallas Oil and Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. App. 1976) (recognizing privilege for confidential sources in civil actions); Dallas Morning News Co. v. Garcia, 822 S.W.2d 675 (Tex. App. 1991) (granting writ of mandamus allowing journalists to keep sources confidential in libel action). ***But see*** State ex. rel. Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994) (no privilege exists in criminal cases); Coleman v. State, 1997 Tx. Crim. App. LEXIS 25 (Tex. Crim. App. 1997), ***rev'd on other grounds***, 966 S.W.2d 525 (Tex. Crim. App. 1998) (no privilege for confidential or nonconfidential information in criminal cases, but quashing of subpoena not reversible error); State v. St. Peter, 315 A.2d 254 (Vt. 1974) (privilege applies in criminal cases); Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974) (privilege applies in criminal cases); Senear v. Daily Journal-American, 641 P.2d 1180 (Wash. 1982) (en banc) (privilege exists in libel cases); Clampitt v. Thurston County, 658 P.2d 641 (Wash. 1983) (en banc) (privilege exists in civil actions in which journalist not a party); State v. Rinaldo, 689 P.2d 392 (Wash. 1984) (en banc) (privilege applies in criminal proceedings); State v. Knops, 183 N.W.2d 93 (Wisc. 1971) (in pre-***Branzburg*** case, privilege found to exist in criminal grand jury case but is overcome by compelling need for journalist's information); Zelenka v. State, 266 N.W.2d 279 (Wisc. 1978) (finding privilege bars disclosure of confidential source in criminal case); State ex. rel. Green Bay Newspaper Co. v. Circuit Court, 335 N.W.2d 367 (Wisc. 1983) (same); Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982) (civil litigant must overcome privilege to subpoena reporter's interview notes from nonconfidential interview with opposing litigant); Bell v. Des Moines, 412

What the SPJ Report Said

The report was published in September 1997. It was written by Holli Hartman, identified on the title page as an intern, with assistance from Bruce W. Sanford, Henry S. Hoberman, and Robert D. Lystad of Washington, D.C., law firm Baker & Hostetler, counsel to SPJ.[12] According to Julie Grimes, SPJ's director of society initiatives, about 1,500 copies were printed and distributed through SPJ's annual convention, through chapters, and to anyone else who requested a copy.[13]

The report began by telling the story of David Kidwell, a *Miami Herald* reporter who interviewed a confessed killer in jail. The prosecution subpoenaed Kidwell to testify about his interview with the man, who had killed his stepdaughter, after the suspect's first trial ended in a mistrial. When Kidwell refused, he was sentenced to seventy days in jail for contempt.[14] The report noted that Kidwell was released after fifteen days pending appeals. However, his first appeal, to the Florida Fourth District Court of Appeal, was decided in the prosecutor's favor.[15] Kidwell was quoted as saying he was angry that the appeal court did not treat seriously the idea

---

N.W.2d 585 (Iowa 1987) (plaintiff in civil action fails to overcome privilege in seeking nonconfidential outtakes of television news footage); Channel Two Television Co. v. Dickerson, 725 S.W.2d 470 (Tex. App. 1987) (vacating order that station turn over notes, outtakes, records and other documents in civil suit); State ex. rel. Hudok v. Henry, 389 S.E.2d 188 (W.Va. 1990) (litigant in civil action must overcome privilege to subpoena non-party journalist as witness); State ex. rel. Charleston Mail v. Ranson, 488 S.E.2d 5 (W.Va. 1997) (criminal defendant must overcome privilege before subpoenaing journalists' nonconfidential photographs of crime scene); Kurzynski v. Spaeth, 538 N.W.2d 554 (Wisc. Ct. App. 1995) (trial court erred in ordering disclosure of magazine's documents in civil suit in which magazine not a party). West Virginia has recognized a privilege only in cases in which nonconfidential information was sought. In addition, Connecticut and Vermont appellate courts have quashed subpoenas for nonconfidential information on technical grounds unrelated to privilege claims. *See* City Council of City of West Haven v. Hall, 429 A.2d 481 (Conn. 1980) (city council had no power to subpoena reporter); State v. Gundlah, 624 A.2d 368 (Vt. 1993) (reporter's constitutional arguments against contempt citation moot because defendant in criminal case entered plea of no contest).

[12] HOLLI HARTMAN, SOC'Y PROF. JOURNALISTS, THE EROSION OF THE REPORTER'S PRIVILEGE 1 (1997).

[13] E-mail message to Anthony L. Fargo from Julie Grimes, Dec. 19, 2000.

[14] Hartman, *supra* note 12, at 3.

[15] *Id. See also* Kidwell v. State, 696 So.2d 399 (Fla. Dist. Ct. App. 1997), *rev'd in part*, 730 So.2d 670 (Fla. 1998).

that his First Amendment rights needed to be balanced against the government's right to fight crime if the source was not confidential.[16]

SPJ went on to suggest that the Kidwell case was part of a trend away from protecting journalists nationwide from subpoenas from civil litigants and criminal defendants and prosecutors. The problem, Hartman wrote, was most evident when journalists sought to protect nonconfidential unpublished material from forced disclosure. George Freeman, general counsel for the New York Times, was quoted as saying that for unpublished nonconfidential information, "courts are having less and less sympathy for the First Amendment arguments."[17]

After discussing the history of the privilege and the U.S. Supreme Court's ruling in *Branzburg v. Hayes*,[18] the report discussed the importance of the privilege for both confidential and nonconfidential material. Quoting or paraphrasing Kidwell; Jane Kirtley, then executive director of the Reporters Committee for Freedom of the Press; Chuck Tobin, assistant general counsel with Gannett Co.; and Paul McMasters, First Amendment ombudsman for The Freedom Forum, the report said the privilege was important because:

• Sources could not trust reporters if they feared the reporters would be called to testify against them later;

• Journalists are objective observers and so are "perfect witnesses," making it tempting for prosecutors to try to turn them into unofficial investigators and blur the line between police and reporters.

---

[16] *Id.*

[17] *Id.*

[18] *Id.* at 4 (*citing* 408 U.S. 665 (1972)) *See* text accompanying *supra* notes 3-6.

• Blurring the lines between police and reporters could put journalists' lives in danger when they cover dangerous situations, such as riots, and protesters fear the journalists' photos and tapes may be turned over to the police.

• Small news organizations suffer the most because a loss of a reporter to the witness stand may take a significant percentage of the staff away from gathering the news.[19]

The report then traced the problems journalists in Florida and Texas had had recently in trying to get subpoenas quashed. In addition to the Kidwell case, the report traced the problems in Florida law back to a 1990 Florida Supreme Court decision, *Miami Herald Publishing Co. v. Morejon*, in which the court said there was no privilege for journalists' nonconfidential, eyewitness observations of a relevant event in a case.[20] SPJ cited a lower state appellate court ruling after *Morejon* in which the court said that *Morejon* meant that there was no privilege for nonconfidential information in any circumstance.[21] The report quoted media attorneys as saying that after *Morejon* the common-law privilege in Florida went from being one of the best in the nation to one of the worst, in part because lower courts interpreted *Morejon* as meaning there was no privilege at all for nonconfidential information, including interview notes.[22]

The report went on to extensively quote Houston media attorney Joel White about the media's problems in Texas. White noted that courts in Texas still recognized a privilege when journalists were subpoenaed in a civil case, but he said there was no privilege for either confidential or nonconfidential information when the underlying case was criminal. In criminal

---

[19] *Id.* at 4-5.

[20] *Id.* at 5 (*citing* Morejon, 561 So.2d 577 (Fla. 1990)).

[21] *Id.* (*citing* Davis v. State, 692 So.2d 924 (Fla. Dist. Ct. App. 1997)).

[22] *Id.* at 6.

cases, White said, there was almost no incentive to fight subpoenas in Texas unless a confidential source who needed protection was involved.[23]

The SPJ report cited a bizarre case in Texas as cementing the no-privilege position. A funeral home director was charged with abuse of a corpse for dumping a dead body on a family's doorstep because the family had not paid its bill. The district attorney subpoenaed unaired videotapes from four television stations that covered the story. In *Healey v. McMeans*, the Texas Court of Criminal Appeals, the state's highest court in criminal cases, refused to quash the subpoenas for the tapes and declared that there was no privilege in criminal cases.[24] In 1997, the report noted, the same court ruled that two *Dallas Morning News* reporters had to testify in a gang-related murder case. The reporters had written about gangs in general and were called by the defense to testify about the "atmosphere" that could relate to the defendant's state of mind. In *Coleman v. State*, the Court of Criminal Appeals refused to quash the subpoenas despite the existence of many alternative sources of information.[25]

The report then cited a number of other opinions in which journalists lost, or appeared to lose, subpoena fights in states with shield laws and in federal courts. Among the cases cited:

• *State v. Turner*, in which a newspaper photographer was subpoenaed for unpublished photographs of an arrest that he took while riding with police. The Minnesota Supreme Court said that neither the First Amendment nor the state shield law protected a reporter from compelled testimony in a criminal cases.[26]

---

[23] *Id.*

[24] *Id.* (*citing* 884 S.W.2d 772 (Tex. Crim. App. 1994)).

[25] *Id.* at 6-7 (*citing* Coleman v. State, 1997 Tex. Crim. App. LEXIS 25 (Tex. Crim. App. 1997)).

[26] *Id.* at 7 (*citing* State v. Turner, 550 N.W.2d 622 (Minn. 1996)).

• *SCI-Sacramento, Inc. v. Superior Court*, in which a California appellate court suggested that prosecutors might have the same due-process rights to subpoena witnesses and evidence as criminal defendants under California law.[27]

• An unnamed county court case in New York, which was (and is) thought to have a strong shield law, in which the court ordered ABC to turn over unaired tapes of its interview with an alleged serial killer. The court reasoned that ABC had chosen to be a participant in the case by interviewing a murder suspect, a job usually left to government officials.[28]

• *United States v. Cutler*, in which, according to SPJ, the Second Circuit of the U.S. Courts of Appeals appeared to narrow its interpretation of the federal journalist's privilege. Bruce Cutler, an attorney for mobster John Gotti, was accused of violating a judge's gag order by talking to the media. As SPJ characterized the case, reporters were subpoenaed to testify about what Cutler said to them, and the appeals court upheld the subpoenas, saying there was no need to balance interests in a criminal case, particularly if the reporters were eyewitnesses.[29]

• *In Re Twila Decker*, in which a reporter in South Carolina was ordered to reveal her confidential source for a sealed psychiatric report on Susan Smith, the woman who drowned her two sons and then went on national television claiming they were kidnapped and begging for their return. SPJ noted that South Carolina had only recently passed a shield law, but the state

---

[27] *Id.* at 7-8 (*citing* 54 Cal.App.4th 654 (Cal. Ct. App. 1997)).

[28] *Id.* at 8.

[29] *Id.* (*citing* United States v. Cutler, 6 F.3d 67 (2d Cir. 1993)). The Cutler decision was actually more complicated, and not quite as negative for the press, as the SPJ report indicated. The Second Circuit quashed subpoenas to the press from Cutler for tapes of media interviews with prosecutors and only sustained the subpoenas for material that would show Cutler speaking to the press, possibly in violation of the gag order.

Supreme Court narrowed it by saying it didn't apply when the court, not a "party" to a case, requested a journalist's information.[30]

The SPJ report then tried to explain why the courts apparently had changed their minds about the privilege and were being more hostile to journalists' claims. Jane Kirtley of the Reporters Committee said judges "simply don't get it" when reporters fight for protection. She suggested that part of the reason might lie with the public's desire to fight crime, which judges may have picked up on, causing them to rule against journalists in criminal cases in particular. Also, she suggested that judges were being pressured to be more efficient and journalists were often quick and easily identifiable sources of information.[31]

Attorney Joel White of Texas suggested that judges had developed a bias against the media because of what they saw as sensational coverage of the O.J. Simpson murder trial in Los Angeles. White said that judges thought reporters were only out to get some "smut" for the front page. White said judges also resented journalists' pleas for special treatment.[32] But Chuck Tobin from Gannett disagreed that judges were media-bashers, saying that judges simply didn't understand why subpoenas might have a chilling effect on journalists. Either media attorneys had not explained the problem well or judges "just don't care," Tobin said.[33]

Kirtley and David Kidwell from the *Miami Herald* suggested in the report that part of the problem was that journalists did not present a united front on the privilege issue. Kidwell noted that his newspaper publicly disagreed with his decision to fight his subpoena for fear his case would make bad law. Kirtley, Tobin, and Paul McMasters of the Freedom Forum said there had

---

[30] *Id.* (*citing* 471 S.E.2d 462 (S.C. 1995) and S.C. CODE ANN. § 19-11-100 (Supp. 1994)).

[31] *Id.* at 9.

[32] *Id.*

been a "weakening of resolve" among some in the media to fight subpoenas and argued that news organizations needed to fight subpoenas more frequently.[34] But White argued that the media needed to pick their battles carefully or risk developing a large amount of negative precedent that could become difficult to overturn.[35]

In conclusion, the report recommended that reporters be careful about what they promise sources regarding confidentiality, because there were no guarantees. The report said media attorneys were split on whether news organizations should change their policies on the retention of notes and unpublished information but agreed that an organization should pick one policy and stick to it to avoid judicial suspicion that notes or tapes were destroyed to avoid a subpoena.[36]

SPJ also quoted experts as suggesting that the best course for news organizations might be to seek strong shield laws in the states because hoping that the U.S. Supreme Court would reconsider the privilege issue was risky. The report ended on a note of optimism, with Joel White suggesting that the level of acceptance of the journalist's privilege was "a swinging pendulum" and reporters could count on getting the protection back.[37]

What Happened to Cases Cited in the Report

In many of the specific cases cited in the SPJ report, later developments would prove more encouraging for the press than the report would lead one to expect.

In Florida, for example, the legislature passed a shield law in 1998 that provides qualified protection to journalists seeking to protect the identities of confidential sources and unpublished

---

[33] *Id.*

[34] *Id.*

[35] *Id.* at 9-10.

[36] *Id.* at 10.

[37] *Id.*

information from forced disclosure.[38] A few months after the legislation was passed, the Florida Supreme Court ruled in the Kidwell case and two others that the privilege in Florida applied to both confidential and nonconfidential information in both civil and criminal cases.[39]

The news from Florida was not all good, however. In one of the three decisions, *State v. Davis*, the Florida Supreme Court said that its ruling was consistent with the new shield law, but it added that in a criminal case, a judge considering a journalist's privilege claim must also weigh the fair-trial and due-process rights of criminal defendants. In the end, the court said the reporter subpoenaed by Davis to testify about her interview with his alleged victim probably should have been required to testify, even though the newspaper account of the victim's story did not differ from what the victim told police.[40] In the *Kidwell* decision, the Supreme Court reversed the lower courts only to the extent of saying there was a privilege for nonconfidential information, but it did not determine what the outcome should have been of Kidwell's privilege claim.[41] On remand, Kidwell was ordered to pay $111 in court costs but was not required to serve the remainder of his jail term.[42]

---

[38] FLA. STAT. ANN. § 90.5015 (West 1999).

[39] The Florida Supreme Court issued all three opinions on the same day in October 1998. Its main opinion was in State v. Davis, 720 So.2d 220 (Fla. 1998), in which it said that a trial judge's decision to quash a subpoena for a reporter who interviewed the alleged victim in a criminal case was not reversible error. The court also said that the reporter had a right to assert the privilege for nonconfidential information. The other two decisions were in Kidwell v. State, 730 So.2d 670 (Fla. 1998) and Morris Communications Corp. v. Frangie, 720 So.2d 230 (Fla. 1998). Frangie arose from a civil suit and a lower appellate court ruled that a reporter who had interviewed the plaintiff could not claim a privilege for nonconfidential information in response to a defense subpoena for his testimony at trial.

[40] State v. Davis, 720 So.2d 220, 229 (Fla. 1998).

[41] Kidwell v. State, 730 So.2d 670 (Fla. 1998).

[42] *Reporter Will Not Serve More Jail Time for Refusal to Testify*, THE BRECHNER REPORT 1 (July 1999).

In Texas, where SPJ reported that the journalist's privilege was nonexistent in criminal cases, the Texas Court of Criminal Appeals reconsidered its decision in *Coleman v. State* and decided that the reporters subpoenaed to testify about gang violence in Dallas would not have to appear.[43] However, the case was decided on standard procedural grounds, not on the basis of any privilege for journalists.

In Minnesota, the legislature amended its shield law to make it clear that unpublished information was protected from forced disclosure, regardless of whether it contained confidential or nonconfidential material.[44] No privilege cases have reached the appellate or high court level in that state since the amendment.

In California, the state Supreme Court later ruled in favor of the reporter in *SCI-Sacramento*. In *Miller v. California*, the court determined that prosecutors did not have due process rights sufficient to overcome the shield law in that state, at least not to the same extent as criminal defendants, despite a state constitutional amendment protecting the state's due process rights.[45]

In short, then, journalists later pulled victories out of defeats in several of the cases cited by the SPJ report. Particularly noteworthy were the decisions in Florida, Texas, Minnesota and California because those cases formed the bulk of the report's discussion of the eroding privilege. But did the new developments mean that SPJ's concerns, and those of the experts it quoted, were no longer valid? Not necessarily, as the next section of this paper will show.

---

[43] Coleman v. State, 966 S.W.2d 525 (Tex. Crim. App. 1998).

[44] MINN. STAT. ANN. §§ 595.021 to 595.025 (West 1988, as amended, Supp. 2000).

[45] Miller v. Superior Court, 986 P.2d 170 (Cal. 1999). One factor working in favor of the journalists was that California is the only state with its privilege recognized in the state Constitution. *See* CAL. CONST., ART. I, § 2.

What Happened After the SPJ Report

A major thrust of the SPJ report on the journalist's privilege was the concern that judges were becoming hostile to privilege claims. Experts quoted in the report, such as Jane Kirtley, Paul McMasters, George Freeman, and Joel White, suggested a number of reasons why courts may have become hostile to journalists' claims of privilege. None of the experts, however, claimed they knew precisely why journalists seemed to be losing more often in court in the years immediately preceding the report than in the past.[46]

To be sure, journalists have won their share of victories in the privilege area since 1997. In addition to the developments noted in the previous section, North Carolina became the thirty-first state to approve a shield law in 1999. The law specifically provides qualified protection to both confidential and nonconfidential information obtained by journalists in the course of news gathering.[47] The highest courts in Michigan and Nevada for the first time determined that shield laws in those states protected nonconfidential information as well as confidential sources.[48] In Colorado, the state Supreme Court overturned a contempt order against a reporter who wanted to shield confidential sources in a libel case and remanded the case.[49] In the Fourth Circuit of the U.S. Courts of Appeals, the court overturned a $600,000 contempt judgment against a reporter and newspaper who revealed the contents of a confidential settlement order in a civil suit and

---

[46] *See* text accompanying *supra* notes 31-35.

[47] N.C. GEN. STAT. ANN. § 8-53.11 (Lexis Publishing 1999).

[48] *See* In Re Investigation of March 1999 Riots in East Lansing, 617 N.W.2d 310 (Mich. 2000) (media organizations do not have to comply with investigative subpoenas for unpublished photographs and unaired videotapes of rioting at Michigan State University); Diaz v. Eighth Judicial Dist. Ct., 993 P.2d 50 (Nev. 2000) (reporter cannot be compelled to testify in civil case about published story under state shield law).

[49] Gordon v. Boyles, 9 P.3d 1106 (Colo. 2000).

reversed a contempt finding against another reporter who refused to reveal his source for an independent verification of the settlement.[50]

But in the federal courts, some evidence of judicial hostility to journalists became evident in two appellate cases, although one of the cases was later reconsidered and partially reversed in favor of the media. In *United States v. Smith*, the Fifth Circuit of the U.S. Courts of Appeals refused to quash a subpoena for a television station's outtakes of an interview with an arson suspect.[51] In response to the television station's argument that allowing subpoenas to the press to go unchecked would hamper news gathering, the court said that the station was not "differently situated" from any business that might find itself in possession of relevant evidence in a criminal trial.[52] The court said that the press could be protected from government attempts to harass it, but short of such harassment, "the media must bear the same burden of producing evidence of wrongdoing as any other citizen."[53]

In the Second Circuit, the three-judge panel that originally heard the case of *Gonzales v. National Broadcasting Co.* went even further than the Fifth Circuit. In rejecting NBC's appeal of an order requiring it to comply with a subpoena in a civil case, the panel also rejected NBC's argument that subpoenas or the threat of subpoenas intruded on the news gathering and editing process. In effect, NBC argued that journalists would be chilled by working in an atmosphere in which the eyes of the government or private litigants were always over their shoulder.[54] The court said that NBC had presented no persuasive argument or empirical evidence of a chill on

---

[50] Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000); Ashcraft v. Conoco, 218 F.3d 288 (4th Cir. 2000).

[51] 135 F.3d 963 (5th Cir. 1998).

[52] *Id.* at 970.

[53] *Id.* at 971.

[54] Gonzales v. Nat'l Broadcasting Co., 155 F.3d 618, 624 (2d Cir. 1998).

editorial decisions caused by disclosure of nonconfidential information. Even if the threat of having nonconfidential material subpoenaed did affect editorial decisions, the court said, the effect might be beneficial. If editors were threatened with subsequent analysis of their decisions, the court said, "such scrutiny is likely to make the final news product more complete, accurate and reliable."[55] The court also quoted the Fifth Circuit in *Smith* in finding that the press was not "differently situated" from other businesses with relevant information.[56]

However, the Second Circuit agreed to reconsider the decision in *Gonzales*. Although its second opinion, like its first, found that NBC had to give up its unaired videotapes to the plaintiff and defendant in a civil rights lawsuit in which NBC was not a party, the court determined that there was a privilege for nonconfidential information in the Second Circuit. The court also acknowledged some of the free-press concerns that NBC raised, in contrast to the first panel's scorn.[57]

In the states, the news about the journalist's privilege was mixed. In Illinois, which has a shield law, the state Supreme Court refused to quash subpoenas for two reporters who were ordered to reveal their confidential sources to a grand jury. The grand jury was investigating whether public officials committed perjury when they said they were not the sources for stories for which the reporters were being sued for libel.[58] In Texas, CBS was forced to turn over a transcript of an entire interview with a murder suspect and outtakes of the unaired portions of the interview to avoid having news anchor Dan Rather testify and a Dallas-based CBS producer

---

[55] *Id.*

[56] *Id.* at 625 (*quoting* United States v. Smith, 135 F.3d 963, 970 (5th Cir. 1998)).

[57] *See* Gonzales v. Nat'l Broadcasting Co., 194 F.3d 29 (2d Cir. 1999).

[58] People v. Pawlaczyk, 724 N.E.2d 901 (Ill. 2000).

jailed. The appellate courts in Texas dismissed CBS's appeals of the trial court's order to turn over the information without comment.[59]

In California, the news was mixed. A flurry of privilege cases in 2000 cast doubts on the strength of the state's seemingly absolute privilege. Tim Crews, the editor of a small Northern California newspaper, was jailed for five days for refusing to reveal his confidential source for a crime story. He later was released from the subpoena after the state changed the charges against the suspect, a former highway patrol officer.[60] In another case, a *Los Angeles Times* reporter persuaded a federal judge to let him stay in a courtroom for a criminal trial after the judge initially threw him out because he was on the prosecution's witness list. The reporter's attorney argued that the reporter was the only *Times* writer in the area and the paper would be shut out of covering the trial of state prison guards accused of staging fights among prisoners.[61]

In another case, a reporter in San Diego turned over to the defense in a murder trial his unpublished notes from his interview with the defendant after appellate courts in California refused to hear his appeal. The reporter, J. Harry Jones, said he decided to comply with the defense subpoena after being threatened with up to a year in jail for contempt. Jones said he had to think of his family and the strain a long jail sentence would put on them.[62] But in another privilege case, the First District California Court of Appeals overturned a contempt finding against a San Francisco reporter who testified in a murder trial about his published article but

---

[59] *See* Terri Langford, *CBS Releases Transcript of Suspect's Interview*, DALLAS MORNING NEWS, Nov. 11, 1999, at A32; Michael Graczyk, Associated Press, *Prosecution Tries Its Case*, downloaded from abcnews.go.com on Nov. 18, 1999.

[60] Joel Davis, *Subpoena Seeking California Editor's Sources Withdrawn*, EDITOR & PUBLISHER (May 1, 2000), downloaded from www.mediainfo.com.80 on May 1, 2000.

[61] *Id.*

[62] Randy Dotinga, *San Diego Reporter Surrenders Notes*, EDITOR & PUBLISHER (June 26, 2000), downloaded from www.mediainfo.com.80 on June 28, 2000.

refused to answer prosecution questions on cross-examination about unpublished material. The court said that under such circumstances, the court should either have stricken the reporter's direct testimony or, if it determined that the direct testimony was critical to the defendant's Sixth Amendment rights to a fair trial after a proper hearing, ordered the reporter to respond to cross-examination.[63]

In response to the subpoena battles in California, the state legislature passed a new law in 2000 that gives journalists some procedural breathing room. The legislation, signed by Gov. Gray Davis in September, requires that journalists be given at least five days' notice before a subpoena is issued so they can consult with counsel. The law also, in apparent response to the San Francisco case, states that a journalist who agrees to testify does not automatically waive protection of the state shield law. Also, the new law requires judges to issue thorough, written findings when they order a reporter to testify after the journalist has asserted the privilege.[64]

Conclusion

The SPJ report warned in 1997 that there appeared to be an erosion of the reporter's privilege in state and federal courts because of an apparent judicial hostility to the press. However, many of the cases the report cited as evidence were later decided in favor of the press or led to the passage of legislation designed to protect journalists from forced disclosure of confidential sources or unpublished information. Was SPJ wrong, or did the report get the mood of the courts right while prematurely counting some cases as losses for the media?

---

[63] Fost v. Superior Court, 95 Cal.Rptr.2d 620 (Cal. Ct. App. 2000).

[64] *See* AB 1860, creating CAL. CIV. PROC. CODE § 1986.1, at the California Legislature's Web site, www.leginfo.ca.gov/pub/99-00/asm/ab_1851-1900/ab_1860_bill_20000911_chaptered.html.

Developments since the report was issued in 1997 indicate that the report may have been right in regard to the federal courts. The opinion in *United States v. Smith* and the first opinion in *Gonzales v. National Broadcasting Co.* show a rather cavalier disregard on the part of judges about the possible chilling effects of subpoenas on news-gathering and editorial processes. The Fifth Circuit's ruling in *Smith* suggested that the media were not "differently situated" from other businesses with potentially relevant information in a court case. The court said the television station fighting a subpoena had given no persuasive arguments or pointed the court to any empirical evidence justifying its position. However, if the station or the court needed such information, neither would have had to go far. The Reporters Committee for Freedom of the Press has compiled data four times since 1989 showing that news organizations nationwide get thousands of subpoenas a year, with individual organizations reporting as many as 175 in a year.[65] What other business faces the potentially burdensome effects of complying with or fighting dozens of subpoenas in a year? Similarly, the Second Circuit's argument in the first *Gonzales* case that if editors had to look over their shoulders while editing, the news product might improve, was nothing short of amazing. How could a fear of judicial oversight of the editorial process make a news product "better," unless one defines "better" as more timid and fearful?

In the states, the CBS case in Texas in 1999 indicates that the state has not backed down from its position that there is no privilege in criminal cases. Cases in California indicate that even a strong shield law is not always adequate protection for journalists, although the new

---

[65] *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989 (1991); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1991 (1993); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1993 (1995); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997 (1999).

procedural law passed in 2000 may help matters somewhat. Also, one can look at the passage of the shield laws in Florida and North Carolina and amendment of the shield law in Minnesota in two ways: either they showed that there was strong support for protecting journalists from testifying in court or providing evidence, or things had gotten so bad in the courts in those states that the legislatures had to act to keep the privilege from being eviscerated. Which interpretation is valid depends on one's point of view.

First Amendment attorney Bruce Sanford, who is credited on the title page of the SPJ report as a contributor,[66] wrote in a 1999 book that judges and, to some extent, the public were showing signs of hostility to the press in all types of cases involving news gathering, including privilege cases.[67] Sanford makes a convincing case, based on anecdotal evidence, that judges, upset at what they perceive as media excesses, are taking a more critical look at the limits of First Amendment freedoms. The SPJ report, published two years earlier, provided an early warning of that trend in the context of one area of media law. While the evidence since that report's publication does not make a clear-cut case for the conclusion that the journalist's privilege is eroding, there is enough anecdotal evidence to give pause to journalists who assume their sources and information gathered on the job are protected from forced disclosure. Even if later events to some extent proved SPJ wrong about some of the evidence for its conclusions, the organization still provided a valuable service in warning journalists that they were not entirely safe from subpoenas.

---

[66] *See supra* note 12.

[67] BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER (1999).

The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws

Anthony L. Fargo
Visiting Assistant Professor of Communication
University of Nevada, Las Vegas

Hank Greenspun School of Communication
4505 Maryland Parkway
Box 455007
Las Vegas, NV 89154-5007
Phone: (702) 895-1373
Fax: (702) 895-4805
E-mail: tfargo19@earthlink.net

1770 N. Green Valley Parkway
Apt. 2824
Henderson, NV 89014
Phone: (702) 407-5644
Cellular: (401) 481-7402

Law Division
AEJMC National Convention
Washington, D.C.
August 5-8, 2001

Acknowledgment

The author wishes to thank the URI Foundation at the University of Rhode Island, whose funding helped make the research for this project possible.

Abstract

The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws

Anthony L. Fargo
Visiting Assistant Professor of Communication
University of Nevada, Las Vegas

Figures compiled by the Reporters Committee for Freedom of the Press show that most news media subpoenas seek nonconfidential information. Journalists argue that all subpoenas infringe on important First Amendment rights to a free flow of information and an independent press. While courts in most of the nineteen states without shield laws protect confidential sources, however, courts in only two states extend the privilege to nonconfidential information in both civil and criminal proceedings, this study found.

The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws

Introduction

After CBS aired an interview with the last defendant awaiting trial in the racially motivated slaying of an African-American man in Jasper, Texas, local prosecutors subpoenaed the outtakes, or unaired portions, of the interview. The prosecutors also sought to subpoena *CBS Evening News* anchor Dan Rather, who conducted the interview for *Sixty Minutes II*.[1] When CBS resisted, a trial judge found a Dallas-based CBS producer in contempt and threatened her with jail if she did not turn over the unedited tapes of the interview.[2] After the Texas Court of Appeals and the Texas Court of Criminal Appeals turned back producer Mary Mapes's appeals,[3] CBS surrendered a transcript of the interview and made the outtakes available to prosecutors, who used portions of the tapes in their case.[4] The defendant, Shawn Allen Berry, was convicted of first-degree murder and sentenced to life in prison.[5]

The specter of a CBS producer being carted off to jail and one of America's most visible news figures sitting in the witness stand – the subpoena for Dan Rather's testimony was dropped – might never have occurred if Texas had a shield law. Texas is among nineteen states without journalist's privilege statutes as of March 2001. Indeed, shortly after the Jasper incident, the

---

[1] *Prosecutors in Jasper Seek Dan Rather's Testimony*, DALLAS MORNING NEWS, Oct. 27, 1999, at A28.

[2] Terri Langford, *Judge Declares CBS Producer in Contempt*, DALLAS MORNING NEWS, Nov. 3, 1999, at A33.

[3] C. Bryson Hull, *CBS Official to Be Jailed for Contempt*, AUSTIN AMERICAN-STATESMAN, Nov. 10, 1999, at B3. Research for this paper indicated that the decisions were not reported.

[4] Michael Graczyk, *Prosecution Tries Its Case*, posted at ABCnews.com on Nov. 11, 1999, and downloaded Nov. 18, 1999.

[5] Terri Langford, *Berry Receives Life Sentence for Jasper Dragging Death*, DALLAS MORNING NEWS, Nov. 19, 1999, at A1.

Dallas Morning News called for the passage of a shield law in an editorial,[6] and a legislator filed a bill to create one.[7] So far, however, no privilege bill has been approved by the Texas Legislature.

The Texas case was further complicated by the apparently nonconfidential nature of the Rather interview with Berry. Berry apparently knew he was going to be identifiable by name and face on the program, and there was no suggestion that any part of the interview was conducted with a guarantee of confidentiality. As the Reporters Committee for Freedom of the Press has found in a series of studies on the journalist's privilege issue, the vast majority of subpoenas received by news organizations are for nonconfidential material, including copies of published or broadcast stories as well as unpublished notes, photographs, and outtakes.[8] If, as journalists claim, all subpoenas infringe on important First Amendment and public policy interests by compromising the free flow of information to the public and the media's autonomy from government, then the amount of protection afforded to nonconfidential information is a particularly important issue.

This paper examines the extent to which nonconfidential information is protected from forced disclosure through subpoenas in the states without shield laws. The next part of this paper

---

[6] *CBS Case Should Prompt Move for Protections*, DALLAS MORNING NEWS, Nov. 15, 1999, at A18.

[7] REPORTERS COMM. FOR FREEDOM OF THE PRESS, *Lawmaker Files Bill to Create a Reporter's Privilege*, downloaded from www.rcfp.org/news/2000/1121texhbn.html on Nov. 22, 2000.

[8] The four Reporters Committee studies published as of March 2001 found that confidential information, such as source identities, was sought by only 3 percent to 5 percent of subpoenas received by news organizations. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989 (1991), at 12; REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1991 (1993), at 13; REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1993 (1995), at 10; REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997 (1999), at 8.

will examine the background of privilege law generally, including a discussion of the U.S. Supreme Court's only direct word on the journalist's privilege, *Branzburg v. Hayes*.[9] Next, the paper focuses on the bases state courts have used to determine that a journalist's privilege exists where there is no shield law. The paper then takes a closer look at the degree to which protection exists for nonconfidential information and the reasons courts in states without shield laws have or have not recognized such a privilege. Finally, the paper will examine how courts in non-shield-law states that have recognized a journalist's privilege have qualified it.

A Brief History of the Journalist's Privilege

Any discussion of the journalist's privilege usually begins with *Branzburg v. Hayes*, the Supreme Court's 1972 decision in a journalist's privilege case. Beginning with *Branzburg* is appropriate because, except in the states that had shield laws when *Branzburg* was argued and decided,[10] that case really was the beginning of widespread protection of journalists' sources and notes. However, that probably was not what the majority of the justices intended.

In *Branzburg*, a 5-4 majority determined that there was no First Amendment-based privilege to protect journalists from being forced to disclose the identities of confidential sources to grand juries when the journalists had witnessed the sources committing crimes or had been given direct evidence of crimes by the sources. Justice Byron White, writing for the majority, said the Court could not "seriously entertain" the idea that it was "better to write about crime than to do something about it."[11] He also said that it was unclear how often and to what extent

---

[9] 408 U.S. 665 (1972).

[10] The Branzburg decision lists seventeen states that had shield laws at the time the case was briefed and argued. Those seventeen were Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania. *Id.* at 689.

[11] *Id.* at 692.

the lack of a privilege would deter sources from coming forward.[12] Faced with uncertainty about the actual effects of subpoenas on journalists, the majority said it did not want to "embark the judiciary on a long and difficult journey" to an uncertain destination.[13] Sooner or later, the Court said, judges would have to define "journalist" and would be embroiled in time-consuming proceedings to determine, on a case-by-case basis, whether journalists should be released from testifying because there was no clear need for their information.[14]

Although the Supreme Court declined to recognize a First Amendment privilege based on the facts before it in *Branzburg*, the majority added that Congress was free to create a statutory privilege, and the states were free to recognize a privilege through statutes or through interpretations of their own constitutions.[15]

In what turned out to be a pivotal concurring opinion, Justice Lewis Powell noted the "limited nature" of the opinion.[16] Journalists who believed they were called to testify by grand juries for harassment purposes or with no legitimate need of law enforcement would still have "access to the court" for a motion to quash, Justice Powell wrote.[17] In such circumstances, according to Justice Powell, the court should balance the rights of a free press against the general obligation of all citizens to testify when called on a case-by-case basis.[18]

---

[12] *Id.* at 693.

[13] *Id.* at 703.

[14] *Id.* at 702-705.

[15] *Id.* at 706.

[16] *Id.* at 709 (Powell, J., concurring).

[17] *Id.* at 710 (Powell, J. concurring).

[18] *Id.* (Powell, J., concurring).

In dissenting opinions, Justice William O. Douglas and Justice Potter Stewart, who was joined by two other justices, argued that the majority had tilted the balance in the wrong direction. Justice Douglas favored an absolute privilege barring any journalist from being called to testify before a grand jury, arguing that no balancing of interests was needed because "all of the `balancing' was done by those who wrote the Bill of Rights" when they cast the First Amendment in "absolute terms."[19] Justice Stewart's dissent favored a qualified privilege, which would bar the government from calling a journalist to testify unless the government first showed that it had probable cause to believe that the journalist had clearly relevant investigation about a specific crime; that the information could not be obtained by alternative means; and that it had a "compelling and overriding interest in the information."[20]

Justices Douglas and Stewart noted a number of First Amendment concerns about the majority opinion. Justice Douglas argued that the decision would impede the "wide-open and robust dissemination" of ideas to the public.[21] The press would be impeded, he argued, because dissidents would be less likely to trust reporters and communicate with them, and reporters would be intimidated by the threat of forced testimony. Such a fate would render the press unable to fulfill its mission to "bring fulfillment to the public's right to know," which was crucial to the public's ability to self-govern.[22]

Justice Stewart, in similar tones, argued that the decision would damage the societal interest in a "full and free flow of information" to the public. Justice Stewart also criticized the

---

[19] *Id.* at 713 (Douglas, J., dissenting).

[20] *Id.* at 743 (Stewart, J., dissenting).

[21] *Id.* at 720-721 (Douglas, J., dissenting).

[22] *Id.* at 721 (Douglas, J., dissenting).

majority for its "crabbed view" of the First Amendment, saying that the decision effectively invited the government to "annex the journalistic profession as an investigative arm," undermining the press's historic independence.[23] To Justice Stewart, there was a direct line from the Court's decisions upholding the right to publish to the right of a journalist to have a confidential relationship with a source. The right to publish meant little if there was no right to gather news, he said, and the right to gather news implied a right to a confidential relationship. Without such a right, Justice Stewart wrote, journalists could not maintain relationships with informants, and informants were necessary to gathering news.[24]

Justice Powell, while cracking open the door a bit on privilege claims if journalists suspected bad faith on the part of grand juries or law enforcement, stopped short of going as far as Justice Stewart. Justice Powell rejected Justice Stewart's argument that a threshold showing of relevance and need was required before the government could even force a journalist into the grand jury room. Justice Powell argued that the Stewart balancing test would tip the scales too far in favor of journalists and against the legitimate interests of law enforcement.[25]

Despite Justice Powell's rejection of the Stewart balancing test, lower federal courts after *Branzburg* largely interpreted the decision as allowing, or even advocating, the creation of a journalist's privilege for confidential information in proceedings other than grand jury sessions, and sometimes even in those sessions. In fact, all but one of the circuits of the U.S. Courts of

---

[23] *Id.* at 725 (Stewart, J., dissenting).

[24] *Id.* at 728 (Stewart, J., dissenting).

[25] *Id.* at 710 and * (Powell, J., concurring).

Appeals have recognized a journalist's privilege in federal law at least once since 1972 to protect confidential sources.[26]

Extending the privilege to nonconfidential information has been more controversial. The leading authority on evidence law, Dean John Henry Wigmore, wrote that privileges generally should be avoided as deterrents to the search for truth in court proceedings. However, those privileges that are created, either by statute or through common-law development, should be those that foster an important relationship in which confidentiality is a key component of the relationship, Wigmore wrote.[27]

But in 1975, a federal district court in Florida ruled in favor of a reporter fighting a subpoena for his testimony about a nonconfidential interview with a party in a civil suit in which the reporter was not a party. In *Loadholtz v. Fields*,[28] the district judge determined that there was no appreciable difference in the "chilling effect" on news gathering caused by subpoenas for confidential or nonconfidential information. Any subpoena, the judge wrote, could interfere with the free flow of information from the press to the public.[29]

---

[26] *See, e.g.*, Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), *reh'g denied*, 466 F.2d 1090 (9th Cir. 1972) (grand jury); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (libel); Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (civil); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (civil); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 454 U.S. 1056 (1981) (federal privilege exists in both civil and criminal cases); LaRouche v. NBC, 780 F.2d 1134 (4th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (journalists have First Amendment privilege, although it is not absolute); United States v. Lloyd, 71 F.3d 1256 (7th Cir. 1995) (district court did not abuse discretion in quashing subpoena in criminal case); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977) (recognizing privilege and finding that documentary filmmaker could assert it); United States v. Caporale, 806 f.2d 1487 (11th Cir. 1986) (recognizing qualified privilege in criminal case). *But see In* Re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) (denying existence of any First Amendment privilege for journalists).

[27] 8 J. WIGMORE, § 2285 (McNaughton revised ed., 1961). *See* text accompanying *infra* note 76.

[28] 389 F.Supp. 1299 (M.D. Fla. 1975).

[29] *Id.* at 1303.

Because the judge in *Loadholtz* did not explain his ruling in any detail, it is not completely clear why he saw a subpoena for nonconfidential information as having a chilling effect on journalists. Federal appellate courts that have considered the nonconfidential-information privilege since 1975 generally have agreed that even subpoenas for nonconfidential material can impede the free flow of information or the news media's independence from government, but also have agreed that nonconfidential information deserves less protection than confidential information from forced disclosure.[30] However, the Fifth Circuit, which has decided only one case involving a subpoena for nonconfidential material, expressly rejected the idea that nonconfidential information deserved any protection from subpoenas.[31] The Fifth Circuit panel took issue with a television station's claims that forcing it to turn over outtakes of an interview with an arson suspect opened the door for undue burdens on the media. The station claimed that the media were particularly vulnerable to subpoenas because they were in the information gathering and dissemination business. But the court said the media were not "differently situated" from any business that might find itself in possession of relevant information in a criminal investigation.[32]

In an unusual case in the Second Circuit, a three-judge panel at first sided with the Fifth Circuit in denying that there was any privilege for nonconfidential information in federal law, then reversed itself on reconsideration.[33] In *Gonzales v. National Broadcasting Co.*, the Second

---

[30] *See* United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied sub nom.*, Cuthbertson v. CBS, Inc., 449 U.S. 1126 (1981); United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981), *cert. denied sub nom.*, Cuthbertson v. CBS, Inc., 454 U.S. 1056 (1981); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995); Church of Scientology v. Daniels, 992 F.2d 1329 (4th Cir. 1993), *cert. denied*, 510 U.S. 869 (1993).

[31] United States v. Smith, 135 F.3d 963 (5th Cir. 1998).

[32] *Id.* at 970.

[33] Gonzales v. Nat'l Broadcasting Co., 155 F.3d 618 (2d Cir. 1998), *rev'd in part on recon.*, 194 F.3d 29 (2d Cir.

Circuit in its second opinion determined that there was a qualified privilege for nonconfidential information in federal law, but that the burden for the party issuing the subpoena was less than if the information sought was confidential.[34] The court said a party seeking to subpoena nonconfidential information from the media needed only to show that the information was of likely relevance to the case and not reasonably available elsewhere.[35] As the court noted, if the information was confidential, the Second Circuit required a showing of high relevance, compelling need, and lack of any alternative sources of information.[36]

The *Gonzales* case spawned commentary on both sides of the nonconfidential-privilege issue. One commentator suggested that the media should welcome the first decision, denying the existence of a privilege for nonconfidential information, because it would save the media from being tempted to fight for a right that it did not have. Instead, the commentator argued, the media could focus on its legitimate concerns about subpoenas for confidential material.[37] But another commentator took the Second Circuit to task for failing, in the first *Gonzales* decision, to "stress the unique functions of the media" and to recognize that the media are special targets of discovery.[38] After the second *Gonzales* decision, a third commentator argued that the Second Circuit had, with good intentions, damaged the law of privilege in general by extending the

---

1999).

[34] 194 F.3d 29, 36 (2d Cir. 1999).

[35] *Id.*

[36] *Id.* at 33 (*citing* In Re Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982)).

[37] Julie M. Zampa, Case Note, *Journalist's Privilege: When Deprivation Is a Benefit*, YALE L. J. 1449 (1999).

[38] Recent Cases, Evidence-Evidentiary Privilege, *Second Circuit Refuses to Recognize Journalists' Privilege for Nonconfidential Information* – Gonzales v. National Broadcasting Co., 155 F.3d 618 (2d Cir. 1998), 112 HARV. L. REV. 2019, 2020 (1999).

journalist's privilege to nonconfidential information, a decision inconsistent with other privileges in federal law, in favor of a relatively insignificant interest that did not serve public ends.[39]

Thirty-one states and the District of Columbia had shield laws on their books as of March 2001.[40] About twenty of those laws either explicitly protect journalists' nonconfidential information from forced disclosure or do so implicitly, by extending protection to unpublished information without limiting that protection to confidential information.[41] Court interpretations of the twenty shield laws that appear to protect nonconfidential information largely confirm that the statutes protect more than confidential information.[42] Most recently, the Nevada Supreme Court

---

[39] Christopher J. Clark, *The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law*, 65 Brooklyn L. Rev. 369, 384-386 (1999).

[40] *See* ALA. CODE § 12-21-142 (Michie 1995, Supp. 1998); ALASKA STAT. §§ 09.25.300 TO 09.25.390 ((1998); ARIZ. REV. STAT. ANN. § 12-2237 (West 1994, Supp. 1999); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995, Supp. 2000); COLO REV. STAT. § 13-90-119 (Bradford 1999); DEL. CODE ANN. TIT. 10, §§ 4320 TO 4326 (Michie 1999); D.C. CODE ANN. §§ 16-4701-16-4704 (Michie 1997, Supp. 1998); FLA. STAT. ANN. § 90.5015 (West 1999, Supp. 2000); GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 1999); ILL. COMP. STAT. ANN. §§ 5/8-901 TO 5/8-909 (Michie 1993, Supp. 1999); IND. CODE ANN. §§ 34-46-4-1 TO 34-46-4-2 (West 1999); KY. REV. STAT. § 421.100 (Michie 1992, Supp. 1999); LA. REV. STAT. ANN. §§ 1451-1459 (West 1999, Supp. 2000); MD. ANN. CODE, CTS. & JUD. PRO., § 9-112 (Lexis Law Pub. 1998, Supp. 2000); MICH. COMP. LAWS § 767.5A (West 1982, as amended, Supp. 1999); MINN. STAT. ANN. §§ 595.021 TO 595.025 (West 1988, as amended, Supp. 2000); MONT. CODE ANN. §§ 26-1-901 TO 26-1-902 (1999); N.M. EVID. RULES § 11-514 (Michie 1994); NEB. REV. STAT. §§ 20-144 TO 20-147 (1997); NEV. REV. STAT. § 49.275 (Michie 1996, Supp. 1999); N.J. STAT. ANN. §§ 2A:84A-21 TO 2A:84A-21.13 (West 1994); N.Y. CIV. RIGHTS LAW § 79-H (West 1992, Supp. 1999); N.C. GEN. STAT. ANN. § 8-53.11 (Lexis law Pub. 1999); N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 1999); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Banks-Baldwin 1994, Supp. 1999); OKLA. STAT. ANN. TIT. 12, § 2506 (West 1993); OR. REV. STAT. ANN. §§ 44.510 TO 44.540 (Butterworth 1988, Supp. 1998); 42 PA. CON. STAT. ANN. § 5942 (West 1982, Supp. 1999); R.I. GEN. LAWS §§ 9-19.1-1 TO 9-19.1-3 (1998); S.C. CODE § 19-11-100 (Lawyers Co-Op 1985, as amended, Supp. 1999); TENN. CODE ANN. § 24-1-208 (Michie 1980, as amended, Supp. 1999).

[41] For shield laws that protect unpublished material without limiting protection to confidential source identities, *see id.*, laws in California, Colorado, Delaware, the District of Columbia, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee. For a discussion of statutory construction and court interpretation regarding protection for nonconfidential information in states with shield laws, *see* Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL'Y 325 (1999).

[42] *See* Fargo, id.

and the Michigan Supreme Court have confirmed that their shield laws protect nonconfidential as well as confidential information.[43]

Although reams of articles have been written about the *Branzburg* decision and the wisdom of protecting journalists from revealing confidential information, little has been written about the privilege for nonconfidential information other than the articles cited above.[44] Articles and other writings that have discussed the privilege for nonconfidential information mostly have focused on specific cases rather than general principles that would or would not support such a privilege.[45]

---

[43] *See* Diaz v. Eighth Judicial Dist. Court, 993 P.2d 50 (Nev. 2000); In Re. Investigation of March 1999 Riots in East Lansing, 617 N.W.2d 310 (2000).

[44] *See* articles cited in *supra* notes 37-39 and 41 and accompanying text.

[45] Exceptions include the annual updates on media law published by the Practising Law Institute in conjunction with its annual media law conference. The updates include discussions of recent trends in privilege law and a brief synopsis of every case ever decided on privilege. *See* JAMES C. GOODALE, 1 COMMUNICATION LAW 843-1259 (2000). *See also* John W. Zucker, *The Journalist's Privilege*, *in* 2 TESTIMONIAL PRIVILEGES § 8 (Scott N. Stone & Robert K. Taylor, eds., 2d ed. 1995, Supp. 1997) (discussing at length which courts and legislatures had recognized a privilege for confidential and/or nonconfidential information and their reasons). Several books about media law generally or the journalist's privilege specifically mention the privilege for unpublished information briefly. *See* MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 157-159 (1979) (noting that the difference between published and unpublished or confidential and nonconfidential information is often hard to determine because of the way reporters work with sources); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 13 (1994); JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS § 8 (1979). One of the first law review articles about a specific case to discuss whether the privilege should be extended to nonconfidential information was Wayne VanDeveer, Comment: *Statutory Construction – Tennessee's Newsman Shield Law – Confidentiality Not a Requirement*, 14 MEMPHIS ST. U. L. REV. 418 (1984) (criticizing Tennessee Supreme Court for interpreting shield law as protecting nonconfidential information). For recent articles about the privilege for nonconfidential information that discuss recent cases or trends, *see, e.g.*, Paul Allee Curtis, Casenote, *New Limits on Freedom of the Press: Newsperson's Qualified Privilege Fails to Protect Nonconfidential Videotape Outtakes* – State v. Salsbury, 34 IDAHO L. REV. 191 (1997); Kevin J. Baum, Casenote, *The Journalist's Privilege: Ensuring That Compelled Disclosure in the Exception, Not the Rule:* Shoen v. Shoen, 3 VILLANOVA SPORTS & ENT. L. J. 557 (1996) (praising Ninth Circuit of the U.S. Courts of Appeals for extending the federal journalist's privilege to a book author's nonconfidential informaton); Michael Fitzsimmons, Casenote, *Defending the Informers: The Media's Right to Protect Non-Confidential Source Information Following* United States v. Smith, 6 VILL. SPORTS & ENT. L. J. 295 (1999) (criticizing Fifth Circuit of the U.S. Courts of Appeals for rejecting privilege for nonconfidential information); Scott A. Mertens, Comment, *Michigan's Shield Laws – A Free or Fettered Press?*, 16 T.M. COOLEY L. REV. 511 (1999) (agreeing with Michigan Court of Appeals for finding that shield law required quashing of subpoenas to news organizations for unpublished photographs and videotape of riot); Jean-Paul Jassy, *The Prosecutor's Subpoena and the Reporter's Privilege*, 17 COMM. LAW. 7 (Winter 2000) (praising "sound reasoning" of California Supreme Court in ordering prosecution subpoena quashed for unaired, nonconfidential videotape); Robert T. Sherwin, Comment, *"Source" of Protection: The Status of the Reporter's Privilege in Texas and a Call to Arms for the State's Legislators and Journalists*, 32

Without clear guidance from the Supreme Court, a federal shield law, or commentators, the journalist's privilege has developed in an ad hoc manner, with rules about who or what is privileged differing from state to state and federal circuit to federal circuit. Nowhere has the ad hoc nature of privilege development been more apparent than in the states that do not have shield laws.

The Basis for the Journalist's Privilege in States Without Shield Laws

Although high and appellate courts in most states without shield laws have at least considered whether a privilege exists protecting confidential sources or confidential information, no state appellate-level cases could be found from Mississippi, Utah, or Wyoming. In addition, Hawaii appellate-level courts apparently have not considered the issue since the Hawaii Supreme Court rejected the existence of a privilege for confidential sources in *In Re Goodfader's Appeal*[46] in 1961, eleven years before *Branzburg v. Hayes*.

States in which appeal courts have recognized a privilege against forced disclosure of confidential source identities in at least some circumstances include Idaho,[47] Iowa,[48] Kansas,[49] Massachusetts,[50] Missouri,[51] New Hampshire,[52] South Dakota,[53] Texas,[54] Vermont,[55] Virginia,[56]

TEX. TECH L. REV. 137 (2000) (calling on Texas Legislature to pass a shield law protecting both confidential and nonconfidential information); Jane E. Kirtley & Jean K. Sbarge, *The Reporter's Privilege: Vanishing As a Federal Protection, Gaining As a State One*, 605 PLI/PAT 165 (June 2000).

[46]367 P.2d 472 (Hawaii 1961).

[47]Sierra Life Insurance Co. v. Magic Valley Newspapers, 623 P.2d 103 (Idaho 1981) (lower court should consider newspaper's privilege arguments before ordering disclosure in libel case); In Re Contempt of Wright, 700 P.2d 40 (Idaho 1985) (recognizing confidential-source privilege in criminal case).

[48]Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977) (privilege exists in civil proceedings but overcome in this case).

[49]State v. Sandstrom, 581 P.2d 812 (Kan. 1978) (limited privilege exists in criminal cases).

[50]Sinnott v. Boston Retirement Bd., 524 N.E.2d 100 (Mass. 1988) (tacitly recognizing privilege in civil case); In Re John Doe Grand Jury Invest., 574 N.E.2d 373 (Mass. 1991) (recognizing privilege in criminal grand jury setting).

Washington,[57] and Wisconsin.[58] West Virginia's highest court has recognized the existence of a journalist's privilege only in nonconfidential-information cases.[59]

Besides West Virginia, a privilege for nonconfidential information has been recognized in certain circumstances by appeal courts in Iowa,[60] Texas,[61] and Wisconsin.[62] In Connecticut and

---

[51]State ex. rel. Classic III Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997) (defendant magazine in libel case not required to reveal confidential sources).

[52]Opinion of the Justices, 373 A.2d 644 (N.H. 1977) (recognizing privilege for confidential information in civil case in which journalist not a party); State v. Siel, 444 A.2d 499 (N.H. 1982) (recognizing privilege in criminal case).

[53]Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780 (S.D. 1995) (recognizing privilege and ruling for journalist in libel case in which journalist was party).

[54]Dallas Oil and Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. App. 1976) (recognizing privilege for confidential sources in civil actions); Dallas Morning News Co. v. Garcia, 822 S.W.2d 675 (Tex. App. 1991) (granting writ of mandamus allowing journalists to keep sources confidential in libel action). *But see* State ex. rel. Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994) (no privilege exists in criminal cases); Coleman v. State, 1997 Tx. Crim. App. LEXIS 25 (Tex. Crim. App. 1997), *rev'd on other grounds*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (no privilege for confidential or nonconfidential information in criminal cases, but quashing of subpoena not reversible error).

[55]State v. St. Peter, 315 A.2d 254 (Vt. 1974) (privilege applies in criminal cases).

[56]Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974) (privilege applies in criminal cases).

[57]Senear v. Daily Journal-American, 641 P.2d 1180 (Wash. 1982) (en banc) (privilege exists in libel cases); Clampitt v. Thurston County, 658 P.2d 641 (Wash. 1983) (en banc) (privilege exists in civil actions in which journalist not a party); State v. Rinaldo, 689 P.2d 392 (Wash. 1984) (en banc) (privilege applies in criminal proceedings).

[58]State v. Knops, 183 N.W.2d 93 (Wisc. 1971) (in pre-*Branzburg* case, privilege found to exist in criminal grand jury case but is overcome by compelling need for journalist's information); Zelenka v. State, 266 N.W.2d 279 (Wisc. 1978) (finding privilege bars disclosure of confidential source in criminal case); State ex. rel. Green Bay Newspaper Co. v. Circuit Court, 335 N.W.2d 367 (Wisc. 1983) (same).

[59]State ex. rel. Hudok v. Henry, 389 S.E.2d 188 (W.Va. 1990) (litigant in civil action must overcome privilege to subpoena non-party journalist as witness); State ex. rel. Charleston Mail v. Ranson, 488 S.E.2d 5 (W.Va. 1997) (criminal defendant must overcome privilege before subpoenaing journalists' nonconfidential photographs of crime scene).

[60]Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982) (civil litigant must overcome privilege to subpoena reporter's interview notes from nonconfidential interview with opposing litigant); Bell v. Des Moines, 412 N.W.2d 585 (Iowa 1987) (plaintiff in civil action fails to overcome privilege in seeking outtakes of television news footage).

[61]Channel Two Television Co. v. Dickerson, 725 S.W.2d 470 (Tex. App. 1987) (vacating order that station turn over nates, outtakes, records and other documents in civil suit). *But see* Dolcefino v. Ray, 902 S.W.2d 163 (Tex. App. 1995) (same court, in slander case, declines to follow Channel Two); Ex Parte Grothe, 687 S.W.2d 736 (Tex. Crim. App. 1985) (no privilege for nonconfidential unpublished photographs in criminal case).

Vermont, reporters seeking to shield nonconfidential information from disclosure have won in appeal courts on grounds unrelated to journalist's privilege claims.[63]

Research for this paper uncovered no nonconfidential-information cases at the high-court or appellate-court level in New Hampshire, Kansas, South Dakota, or Virginia, and only the cases mentioned earlier in Connecticut and Vermont. Appeal courts in Idaho, Maine, Massachusetts, Missouri, and, in criminal cases, Texas, have rejected the existence of a privilege for nonconfidential information,[64] although all but Texas's Court of Criminal Appeals, its highest court in criminal cases, have recognized privileges for confidential information.

The states without shield laws in which courts have recognized a journalist's privilege for either confidential or nonconfidential information, or both, have differed on determining the basis for the privilege. Sometimes there has been disagreement about the source of the privilege even within the same state.

---

[62]Kurzynski v. Spaeth, 538 N.W.2d 554 (Wisc. Ct. App. 1995) (trial court erred in ordering disclosure of magazine's documents in civil suit in which magazine not a party).

[63]City Council of City of West Haven v. Hall, 429 A.2d 481 (Conn. 1980) (city council had no power to subpoena reporter); State v. Gundlah, 624 A.2d 368 (Vt. 1993) (reporter's constitutional arguments against contempt citation moot because defendant in criminal case entered plea of no contest).

[64]*See, e.g.*, State v. Salsbury, 924 P.2d 208 (Idaho 1996) (privilege does not apply in criminal case if information is nonconfidential); State v. Hohler, 543 A.2d 364 (Maine 1988) (no privilege exists for nonconfidential, published information in criminal case); In Re Letellier, 578 A.2d 722 (Maine 1990) (no privilege for outtakes of nonconfidential interview in criminal grand jury setting); Commonwealth v. Corsetti, 438 N.E.2d 805 (Mass. 1982) (privilege did not apply because reporter was not trying to shield confidential source from disclosure); CBS Inc. (KMOX-TV) v. Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982) (station's nonconfidential outtakes not protected from disclosure to criminal grand jury under First Amendment or state constitution); State ex. rel. Classic III Inc. v. Ely, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) (noting that privilege recognized in case only applied if journalist sought to protect confidential information); Ex Parte Grothe, 687 S.W.2d 736 (Tex. Crim. App. 1984) (no privilege for nonconfidential photographs of alleged crime); State ex. rel. Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994) (no privilege exists in criminal cases for nonconfidential information); DeGarmo v. State, 922 S.W.2d 256 (Tex. App. 1996) (no privilege exists for nonconfidential information in criminal cases, but trial court's quashing of subpoena for reporter did not amount to reversible error); Coleman v. State, 1997 Tx. Crim. App. LEXIS 25 (Tex. Crim. App. 1997), *rev'd on other grounds*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc) (no privilege exists for reporters who wrote series about gangs in general six weeks after gang-related slaying).

Massachusetts and Washington high courts have looked to the common law of their states to determine if a privilege of any type existed. In rejecting a reporter's appeal of an order that he identify his sources in a deposition concerning a disciplinary matter against a judge, the Supreme Judicial Court of Massachusetts in 1980 limited its findings to the case at hand, *In Re Roche*.[65] Although the court conceded that forcing journalists to reveal confidential sources might encroach on First Amendment rights, the justices said the limits on privileges for journalists could best be defined through statutory or common-law development.[66]

In a nonconfidential-information case in 1982, the Massachusetts court again turned to the common law for guidance in *Commonwealth v. Corsetti*.[67] Newspaper reporter Paul Corsetti was held in contempt for refusing to testify about his interview with a murder defendant after the defendant moved to suppress statements to Corsetti and to police officers about the slaying.[68] The court rejected Corsetti's claims that the contempt citation was in violation of his rights under the First Amendment and Massachusetts Constitution.[69] The court said that even if there were a common-law journalist's privilege in Massachusetts, it would not apply in a case in which the reporter's source was known and the information sought already was public.[70]

In 1985, the Supreme Judicial Court received a petition from the Governor's Press Shield Law Task Force asking it to adopt a privilege as a court rule. The privilege would have protected

---

[65]411 N.E.2d 466 (Mass. 1980).

[66]*Id.* at 474.

[67]438 N.E.2d 805 (Mass. 1982).

[68]*Id.* at 807-808.

[69]*Id.* at 808.

[70]*Id.* at 809.

journalists from the disclosure of confidential sources and unpublished information. The court in *Promulgation of Rules Regarding Protection of Confidential News Sources*[71] declined to do so, citing a lack of consensus among even the members of the task force about the need for and parameters of the proposed rule.[72] The court also reiterated its support for the common-law development of any journalist's privilege as the best way to ensure that whatever principles resulted would be "flexible enough to maintain an appropriate balance between the competing interests involved."[73]

In three later cases in which the Supreme Judicial Court upheld lower court rulings excluding journalists' testimony from civil and criminal cases, the court was content to state that the lower courts correctly had applied common-law principles in determining that journalists would not have to reveal confidential sources.[74]

---

[71]479 N.E.2d 154 (Mass. 1985).

[72]*Id.* at 156.

[73]*Id.* at 158.

[74]*See* Sinnott v. Boston Retirement Bd., 524 N.E.2d 100 (Mass. 1988) (civil action); In Re John Doe Grand Jury Invest., 574 N.E.2d 373 (Mass. 1991) (criminal grand jury); Commonwealth v. Bui, 645 N.E.2d 689 (Mass. 1995) (criminal case).

In Washington, unlike Massachusetts, the state supreme court created a common-law privilege in the first case in which it considered the issue, *Senear v. Daily Journal-American.*[75] Noting that testimonial privileges generally were not favored in the common law, the court, in a libel case, turned to Dean John Henry Wigmore's treatise on evidence to determine under what conditions privileges should be favored. Wigmore wrote that there were four conditions that must be met before a privilege should be recognized:

[75]641 P.2d 1180 (Wash. 1978).

> (1) The communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[76]

The first two conditions normally were present so as to justify establishment of the privilege, the court said. As to the third condition, the court said that it existed with "particular force" in 1978. Because society had become more complex, because citizens needed to make considered judgments in a representative democracy, and because of the "increasing importance of journalists to convey information to citizens," the court said, the confidential relationship between journalists and sources was one it believed needed to be "sedulously fostered."[77] As to the fourth condition, the court said, at least in matters of civil litigation, the injury from failing to recognize the privilege would be greater than the benefits to be gained from requiring testimony.[78] In later cases, the Washington Supreme Court found that the common-law privilege for confidential information applied and found in favor of the press in a civil case in which the reporter was not a party, *Clampitt v. Thurston County*,[79] and in a criminal case, *State v. Rinaldo*.[80]

In most states without shield laws, however, the courts have relied upon the First Amendment, state constitutions, or both in determining whether a privilege should exist. Among the states in which appeal courts have recognized a privilege for at least confidential sources, the

---

[76]*Id.* at 1182 (*citing* State ex. rel. Haugland v. Smythe, 169 P.2d 706 (1946)). *See* 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton ed. 1961).

[77]*Id.* at 1183.

[78]*Id.*

[79]658 P.2d 641 (Wash. 1983).

[80]689 P.2d 392 (Wash. 1984).

preferred approach appears to be to ground support for the privilege in both the state and federal constitutions.

The Idaho Supreme Court, for example, in 1985 stated that its examination of *Branzburg v. Hayes* and its progeny supported a finding that there was a qualified journalist's privilege under the First Amendment. The court, in *In Re Contempt of Wright*,[81] noted that Idaho's constitution provided press protection "substantially similar to" the First Amendment and also grounded its decision favoring a privilege for confidential sources on the state constitution.[82]

In Iowa, the Supreme Court rejected the idea that *Branzburg* foreclosed a First Amendment-based privilege for journalists seeking to protect the identities of confidential sources in *Winegard v. Oxberger*.[83] Later, the court added that, "[f]or purpose of clarity," it also was grounding the privilege it had just recognized for confidential sources in the Iowa Constitution.[84] The court did not state why it needed to do so for the "purpose of clarity." However, the court also found that the civil litigant who subpoenaed a reporter had met his burden in overcoming the privilege claim.[85]

New Hampshire in 1977 tied its recognition of a privilege for confidential sources to its own constitution. The New Hampshire Supreme Court in *Opinion of the Justices*[86] noted that the majority opinion in *Branzburg v. Hayes* had conceded that the U.S. Supreme Court was

---

[81]700 P.2d 40 (Idaho 1985).

[82]*Id.* at 45 (*citing* IDAHO CONST. ART. I, § 9).

[83]258 N.W.2d 847 (Iowa 1977).

[84]*Id.* at 852 (*citing* IOWA CONST. ART. I, § 7). *See also* Bell v. Des Moines, 412 N.W.2d 585, 587 (Iowa 1987) (privilege exists under both First Amendment and Iowa Constitution).

[85]*Id.* at 852-853.

[86]373 A.2d 644 (N.H. 1977).

"powerless" to stop states from recognizing a journalist's privilege based on the states' constitutions.[87] The court found support for the privilege in its own constitution's guarantee of "liberty of the press."[88] But five years later, in applying the privilege to protect confidential sources in a criminal case, the Supreme Court relied upon both the First Amendment and its constitution. In *State v. Siel*,[89] the court said that it read *Branzburg* as recognizing a qualified First Amendment privilege.[90] The court added that it saw no reason to believe that the privilege it recognized in 1977 in a civil case should "cease to exist" in a criminal matter, although it said the privilege was "more tenuous" in criminal cases.[91]

Wisconsin relied upon both its own constitution and a generous reading of *Branzburg* to find a privilege for confidential sources existing under both state and federal law. The court in *Zelenka v. State*[92] read Justice Powell's concurring opinion in *Branzburg* as a clear recognition of the existence of a qualified privilege.[93] Thus, the court said, the privilege could be justified under both the First Amendment and Article I, Section 3 of the Wisconsin Constitution.[94]

---

[87]*Id.* at 646-647 (N.H. 1977) (*citing* Branzburg v. Hayes, 408 U.S. 665, 706 (1972)).

[88]*Id.* at 647 (*citing* N.H. CONST. PT. I, ART. 22).

[89]444 A.2d 499 (N.H. 1982).

[90]*Id.*

[91]*Id.* at 503.

[92]266 N.W.2d 279 (Wisc. 1978).

[93]*Id.* at 287.

[94]*Id.* at 286. WISC. CONST. ART. I, § 3, reads: "Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." *Id. See also* Kurzynski v. Spaeth, 538 N.W.2d 554, 559 (Wisc. Ct. App. 1995) (scope of the privilege is the same whether measured by the First Amendment or Wisconsin's constitution). *But see* State ex. rel. Green Bay Newspaper Co. v. Circuit Court, 335 N.W.2d 367, 372 (Wisc. 1983) (privilege recognized in Zelenka v. State rested on Wisconsin Constitution; no mention of First Amendment).

Virginia tied its recognition of a journalist's privilege in a confidential-source case solely to the First Amendment. In *Brown v. Commonwealth*,[95] the Virginia Supreme Court noted that the privilege was related to the First Amendment but was not a First Amendment right in and of itself. The court said the privilege was designed to be an "important catalyst" to the free flow of information guaranteed by the First Amendment's press clause.[96]

The Kansas Supreme Court in *State v. Sandstrom*[97] tied the privilege for confidential information to the First Amendment by stating that the U.S. Supreme Court "recognized the privilege" in *Branzburg v. Hayes*.[98] The Kansas Supreme Court took note of Justice Powell's concurrence in *Branzburg* and noted that lower federal courts and state courts had interpreted Powell's opinion as an endorsement of a balancing test in criminal cases between First Amendment interests in nondisclosure and the defendant's right to a fair trial.[99]

A Missouri Court of Appeals also extensively quoted *Branzburg* and its progeny in *State ex. rel. Classic III Inc. v. Ely*[100] for the proposition that a qualified privilege for confidential sources existed under the First Amendment. Missouri's Supreme Court, the highest court in that state, has not decided the issue of whether there is a journalist's privilege in that state. Vermont's Supreme Court took a path similar to the Missouri Court of Appeals in a criminal case in which it recognized a privilege for confidential information.[101]

---

[95]204 S.E.2d 429 (Va. 1974).

[96]*Id.* at 431.

[97]581 P.2d 812 (Kan. 1978).

[98]*Id.* at 814.

[99]*Id.* at 815.

[100]954 S.W.2d 650 (Mo. Ct. App. 1997).

[101]State v. St. Peter, 315 A.2d 254, 255-256 (Vt. 1974).

The South Dakota Supreme Court has recognized a qualified privilege for confidential sources without explaining the basis for the privilege. In *Hopewell v. Midcontinent Broadcasting Corp.*,[102] the state Supreme Court noted that South Dakota had no shield law and declined to create an absolute privilege for journalists. However, the court added that it declined to hold that there was no privilege and thus leave journalists' sources with no protection. The court held that there was a qualified privilege protecting confidential news sources from disclosure under certain circumstances.[103] The court did not spell out what those circumstances were or on what basis it recognized a privilege. The only case it cited was a California Supreme Court case which, like the case before the South Dakota court, dealt with the existence of a privilege in a libel proceeding.[104] The court ruled in favor of the journalist who had won the quashing of a libel plaintiff's subpoena in the trial court.

Texas appeal courts have disagreed about what basis exists, if any, for a journalist's privilege in civil matters. While appeal courts in Texas consistently have held that there is no privilege in criminal cases, whether the information is confidential or nonconfidential,[105] appellate courts generally have found until recently that there is a privilege for confidential information in civil cases. In the first case in which an intermediate appellate court in Texas recognized a privilege in a civil case, *Dallas Oil & Gas, Inc. v. Mouer*,[106] the court stated only

---

[102]538 N.W.2d 780 (S.D. 1995).

[103]*Id.* at 782.

[104]*Id.* (*citing* Mitchell v. Superior Court, 27 Cal.3d 268, 208 Cal.Rptr. 152, 159-162, 690 P.2d 625, 632-635 (Cal. 1984)).

[105]*See* Ex Parte Grothe, 687 S.W.2d 736 (Tex. Crim. App. 1984) (no privilege exists for nonconfidential information in criminal cases); State ex. rel. Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994) (same); DeGarmo v. State, 922 S.W.2d 256 (Tex. App. 1996) (same); Coleman v. State, 1997 Tx. Crim. App. LEXIS 25 (Tex. Crim. App. 1997), *rev'd on other grounds*, 966 S.W.2d 525 (1998) (no privilege exists for either confidential or nonconfidential information in criminal cases, but quashing of subpoena by trial court not reversible error).

[106]533 S.W.2d 70 (Tex. App. 1976).

that it rested on "constitutional" grounds. However, the court hinted that it was referring to the First Amendment by citing *Branzburg* and other federal cases favoring a balancing of the public interest in a free flow of information against other interests.[107]

In 1987, a Texas Court of Appeals panel in Houston extended the privilege to nonconfidential information and grounded the decision on both the U.S. and Texas constitutions in *Channel Two Television Co. v. Dickerson*.[108] Another Court of Appeals came to the same conclusion in *Dallas Morning News Co. v. Garcia*,[109] a libel case involving confidential sources in 1991. But in 1995, the same court (although not the same three-judge panel) that ruled in *Channel Two* that there was a privilege under both the U.S. and Texas constitutions that protected nonconfidential information rejected the 1987 ruling. In *Dolcefino v. Ray*,[110] the Court of Appeals in Houston noted that *Channel Two* cited *Branzburg* for the proposition that the U.S. Supreme Court created a qualified privilege for journalists. The *Dolcefino* court found no such holding in *Branzburg* and said the panel that decided *Channel Two* went too far.[111] Having said that, however, the court declined to say one way or the other whether a privilege existed in Texas.[112] If one did exist, however, it would not relate to nonconfidential information, the court said, because the only purpose of a privilege was to protect the identities of confidential sources.[113] In 1999, a Texas Court of Appeals panel stated virtually the same thing in overturning

---

[107] *Id.* at 77.

[108] 725 S.W.2d 470 (Tex. App. 1987).

[109] 822 S.W. 675 (Tex. App. 1991).

[110] 902 S.W.2d 163 (Tex. App. 1995).

[111] *Id.* at 164.

[112] *Id.* at 164-165.

[113] *Id.* at 165.

a lower court order quashing a subpoena. As in *Dolcefino*, the appellate court in *In Re Union Pacific Railroad Co.*[114] declined to determine whether there was a privilege for confidential information in civil cases. Also like the *Dolcefino* court, however, the *Union Pacific* court determined that if a privilege existed, it did not extend to nonconfidential information, such as the unaired videotapes subpoenaed in the underlying civil suit over a fatal train-car accident.[115]

Appeal courts in states without shield laws that have recognized a journalist's privilege for confidential sources have, for the most part, relied upon interpreting the First Amendment, solely or in conjunction with their state constitutions, for determining whether the privilege exists. Massachusetts and Washington, by contrast, have relied upon the development of common law to determine whether journalists are protected by a privilege.

Why Protect Nonconfidential Information?

Whether there is any privilege for nonconfidential information in the nineteen states without shield laws often depends upon what First Amendment or state constitutional rights courts believe are promoted by the privilege. In some instances, appeal courts in states where a privilege for confidential information has been recognized have found that the constitutional values protected by the privilege only apply to confidential source identities and not to nonconfidential information.

West Virginia's Supreme Court of Appeals has perhaps summed up the issue of conflicting constitutional values best in *State ex. rel. Hudok v. Henry.*[116] In recognizing a privilege for nonconfidential information in a civil case, the court in 1989 looked back over

---

[114] 6 S.W.3d 310 (Tex. App. 1999).

[115] *Id.* at 312.

[116] 389 S.E.2d 188 (W.Va. 1989).

Branzburg and its progeny and discerned two grounds for a qualified privilege: (1) the protection of confidential sources to allow journalists to gather information and develop news leads; and (2) the protection of the news-gathering function and the free flow of information to the public from infringement by the routine subpoenaing of reporters.[117] In the latter case, the court said, most federal and state courts that had grounded a privilege on the value of keeping reporters free from burdensome subpoenas had determined that confidentiality was not a prerequisite to asserting the privilege.[118]

No Privilege for Nonconfidential Information

Although West Virginia's highest court found the privilege available to journalists seeking to withhold nonconfidential information, Maine considered much the same background and came to the opposite conclusion. In two cases involving nonconfidential information, the court rejected reporters' claims that protecting them from disclosing the information was essential under the First Amendment. In the first case, *State v. Hohler* in 1988,[119] the Supreme Judicial Court rejected a reporter's claim that he should be spared from testifying about his published, nonconfidential interview with a murder suspect. While noting, as did West Virginia in *Hudok*, that numerous federal and state courts had recognized a privilege for nonconfidential, unpublished information as well as confidential information, the court said it failed to see how requiring a reporter to testify about nonconfidential information infringed on First Amendment values.[120]

---

[117]*Id.* at 192.

[118]*Id.* at 192 (citations omitted). *See also* State ex. rel. Charleston Mail v. Ranson, 488 S.E.2d 5 (W.Va. 1997) (recognizing privilege for nonconfidential information in criminal case).

[119]543 A.2d 364 (Maine 1988).

[120]*Id.* at 366.

In another criminal case two years later, the Maine high court in *In Re Letellier*[121] again rejected a privilege for nonconfidential information, this time for unaired outtakes of a television interview with a public official suspected of abusing his office. The court conceded that the First Amendment required it to balance the competing interests of the state and the journalists, but it found the journalists' case "much weaker" than if the state had sought confidential information. The court also said it was not persuaded that ordering disclosure of the tapes would inhibit future news sources or encourage the wholesale subpoenaing of journalists' files.[122]

Similarly, the Idaho Supreme Court determined in 1996 that forced disclosure of unaired video footage from the scene of a fatal auto accident would have little if any "chilling effect" on First Amendment or state constitutional values. In *State v. Salsbury*,[123] the state sought to subpoena unaired, nonconfidential videotape to use as evidence in its prosecution of a newspaper reporter charged with resisting and obstructing a police officer at the accident scene.[124] The court, which had based its recognition of a privilege for confidential sources in 1985 on the First Amendment and Idaho Constitution,[125] said there was no realistic threat to the free flow of information to the press or public from requiring disclosure of the outtakes. "Credibility balks at the idea that a TV station might stop covering fatal automobile accidents" if it risked being subpoenaed in criminal prosecutions, the court said.[126] So indirectly, the court tied the journalist's privilege for confidential sources to the First Amendment's and Idaho Constitution's protection of

---

[121]578 A.2d 722 (Maine 1990).

[122]*Id.* at 728.

[123]924 P.2d 208 (Idaho 1996).

[124]*Id.* at 208.

[125]In Re Contempt of Wright, 700 P.2d 40 (Idaho 1985). *See* text accompanying *supra* notes 81-82.

[126]*Id.* at 213.

a free flow of information to the press and public. It found the same concerns unpersuasive when the material sought was nonconfidential, at least when the nonconfidential information in question was outtakes from coverage of an auto accident.

A Missouri Court of Appeals also determined that the journalist's privilege should not apply to nonconfidential material. In its only case on the nonconfidentiality issue, the Missouri Court of Appeals in 1983 left open the question of whether a privilege existed for confidential sources in that state. However, the intermediate appellate court made it clear in *Columbia Broadcasting System Inc. (KMOX-TV) v. Campbell*[127] that the privilege did not exist if the information was nonconfidential and sought by a grand jury investigating a crime. When a Missouri Court of Appeals determined that a privilege did exist for confidential sources in 1997, it explicitly limited the privilege under the First Amendment to confidential sources.[128] The interest at stake in privilege cases, the court said, was the "free flow of information to the public."[129]

The Washington Supreme Court, which relied on state common law in determining that a journalist's privilege existed, also has limited the privilege to confidential sources.[130] The decision to limit the privilege to cases involving confidentiality is unsurprising, given that the court reached its conclusion that a privilege existed by finding that the journalist's privilege met

---

[127]645 S.W.2d 30 (Mo. Ct. App. 1983).

[128]State ex. rel. Classic III, Inc. v. Ely, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997) ("... we emphasize that the trial court must undertake this balancing test only if the journalist invokes a reporter's shield privilege based on a promise of confidentiality to his or her source.")

[129]*Id.* at 656.

[130]*See* text accompanying *supra* notes 75-80.

all four of Wigmore's criteria for privilege creation, which stress the confidential nature of the relationship.[131]

In Massachusetts, which, like Washington, has recognized a confidential-source privilege based on common-law precepts,[132] appeal courts generally have avoided a discussion of whether the privilege extends to nonconfidential material. In the only Massachusetts high-court case to consider explicitly a privilege for nonconfidential information, the Supreme Judicial Court flatly rejected the privilege in *Commonwealth v. Corsetti*.[133] But that case preceded the court's recognition of a privilege for confidential sources to protect the free flow of information and the public's need to be informed.[134]

States Recognizing a Privilege for Nonconfidential Information

Iowa's Supreme Court has recognized a privilege in both confidential-source and nonconfidential-information cases without making a distinction. The court has never clearly enunciated what specific values are at stake when journalists are subpoenaed, but it has held that a party seeking a journalist's information must overcome the presumption of a privilege. In *Lamberto v. Bown*,[135] the court ruled in favor of a newspaper reporter resisting a subpoena to testify about his nonconfidential interview with a litigant in a civil matter.[136] In *Bell v. Des Moines*,[137] the court ruled in favor of a television station seeking to protect unaired videotape of a

---

[131] *See* text accompanying *supra* notes 75-76.

[132] *See* text accompanying *supra* notes 74.

[133] 438 N.E.2d 805 (Mass. 1982).

[134] Sinnott v. Boston Retirement Bd., 524 N.E.2d 100, 104 (Mass. 1988); In Re John Doe Grand Jury Invest., 574 N.E.2d 373, 375-376 (Mass. 1991). *See* text accompanying *supra* note 74.

[135] 326 N.W.2d 305 (Iowa 1982).

[136] *Id.* at 306.

[137] 412 N.W.2d 585 (Iowa 1987).

man's suicide in a public place from a plaintiff's subpoena in a civil suit.[138] In a criminal case, *Denk v. Iowa District Court*,[139] the Supreme Court of Iowa found that a judge needed to make roughly the same determination in criminal cases as in civil cases before ordering a television station to produce aired and unaired videotape in a criminal investigation.[140] In none of the cases did the Iowa Supreme Court draw any distinction between confidential and nonconfidential information, but neither did it discuss what First Amendment values were served by recognizing a privilege.

In Wisconsin, the state Court of Appeals, the intermediate appellate court in that state, ruled in favor of nonparty journalists appealing a discovery order for all documents related to nonconfidential interviews with patients of the civil defendant dentist for a magazine story about his practice.[141] In finding that the journalist's privilege under both the First Amendment and Wisconsin Constitution applied to nonconfidential information, the appellate court in *Kurzynski v. Spaeth* quoted heavily from a U.S. Court of Appeals ruling[142] for the proposition that a promise of confidentiality was not required in order for the privilege to apply.[143] The court said the constitutional issue at stake on the journalists' side was "the need to insulate journalists from undue intrusion into their news-gathering activities."[144]

---

[138]*Id.* at 586.

[139]20 Media L. Rep. 1454 (BNA) (Iowa 1992).

[140]*Id.* at 1455. The court's order staying execution of the state's subpoena did not discuss the facts of the underlying case.

[141]Kurzynski v. Spaeth, 538 N.W.2d 554 (Wisc. Ct. App. 1995).

[142]Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995).

[143]Kurzynski v. Spaeth, 538 N.W. 2d 554, 559 (Wisc. Ct. App. 1995).

[144]*Id.*

In Texas, appeal courts have been consistent in stating that there is no privilege for nonconfidential or confidential material in criminal cases, but the situation is different for civil matters. In *Channel Two Television Co. v. Dickerson*,[145] a Texas Court of Appeals in 1987 granted a writ of mandamus ordering a judge to vacate his discovery order against a nonparty television station in a civil matter.[146] In so doing, the appellate court cited the "paramount public interest" in maintaining a vigorous press "capable of unfettered debate over controversial matters."[147] The court did not discuss whether it considered the materials confidential or nonconfidential and whether that distinction would make a difference.[148] But eight years later, a different panel of the same Court of Appeals found that there was no privilege for nonconfidential materials in a civil suit in which the journalist was a party. In *Dolcefino v. Ray*,[149] the court denied a writ of mandamus to a reporter accused of slander. The court panel determined that Dolcefino's source already had been discovered by the plaintiff in his slander suit. "The reason for having a reporter's privilege," the court said, "is so informants will know that if they speak to the press, courts will not force the press to disclose their identity."[150] Because no such danger existed in this case, the court said, there was no privilege.[151] Another

---

[145]725 S.W.2d 470 (Tex. App. 1987).

[146]*Id.* at 471.

[147]*Id.* at 472.

[148]It appears from the opinion that at least some of the material sought by the litigant in the civil suit was nonconfidential. According to the opinion, the subpoena concerned a story the television station aired about the lawsuit. The subpoena sought "[d]ocuments, notes, video-tape, film, and any other tangible documents relating to George Aubin, Jack Fletcher, Brigand Silk [a racehorse whose death was at the heart of the suit], Mercury Savings Association of Texas, and Ben Milam Savings and Loan Association." *Id.* at 471.

[149]902 S.W.2d 165 (Tex. App. 1995).

[150]*Id.* at 165.

[151]*Id.*

Texas Court of Appeals panel said virtually the same thing in 1999 in *In Re Union Pacific Railroad Co.*[152]

In short, then, high courts in Iowa and West Virginia have recognized a privilege for nonconfidential information in both civil and criminal cases. A Wisconsin appellate court has recognized a privilege for nonconfidential information in a civil case, while Texas courts have been inconsistent in determining that a privilege for nonconfidential information existed in civil cases, but consistently have said that there is no privilege in criminal cases. Idaho, Maine, Massachusetts, Missouri, and Washington have rejected the existence of a privilege for nonconfidential information so far. Other states without shield laws have not considered the merits of the privilege for nonconfidential information.

How is the Privilege Qualified?

In the federal courts, there is some general agreement that parties seeking to subpoena nonconfidential information from the press have an easier path to success than if they were subpoenaing confidential material, and the Second Circuit recently tied a specific balancing test to nonconfidential material that is less stringent than its test for confidential information.[153] Similarly, New York's shield law sets a lower barrier for those seeking nonconfidential material than confidential information,[154] while the California Supreme Court has determined that whether information is nonconfidential is a factor to be considered when criminal defendants subpoena the press.[155] It would not be outside the realm of logic, therefore, to assume that at least some

---

[152] 6 S.W.3d 310 (Tex. App. 1999).

[153] *See* text accompanying *supra* notes 34-35.

[154] *See* N.Y. CIV. RIGHTS CODE § 79-h (West 1992, Supp. 1999) (creating absolute privilege for confidential information but qualified privilege for nonconfidential information).

[155] *See* Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990).

states without shield laws also have determined that nonconfidential information gets less protection from subpoenas than confidential information. But that is not the case.

None of the state courts that have recognized a privilege for nonconfidential information have ruled that it is absolute. Each state has endorsed a qualified privilege, in which a party seeking to subpoena the press can overcome the presumption of a privilege by some sort of showing. In courts in states without shield laws, none of the courts has determined that the showing required when the sought-after information is nonconfidential is different than the showing when the information is confidential. However, sometimes the type of proceeding -- criminal, civil, libel, or grand jury -- has made a difference.

Nearly all of the state courts that have recognized a privilege for nonconfidential information use some variation on the Stewart three-part test from *Branzburg v. Hayes*:[156] compelling need, relevance, and lack of alternative sources.

In Iowa, the Supreme Court has differed somewhat on what the proper test is and how to apply it, but those differences have had nothing to do with whether the information was confidential or nonconfidential. In a confidential-source action in a civil case, *Winegard v. Oxberger*,[157] the court determined that a civil litigant seeking a journalist's source must show that the information is necessary or critical to the action, that other sources have been exhausted, and that the underlying action or defense is not patently frivolous.[158] In its next case on the subject, this one involving nonconfidential information, the court struck the "frivolous" prong of the test, noting that it appeared to be unique to *Winegard*.[159] In *Lamberto v. Bown*, the court added that as

---

[156]408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

[157]258 N.W. 2d 847 (Iowa 1977).

[158]*Id.* at 852.

[159]Lamberto v. Bown, 326 N.W.2d 305, 308 (Iowa 1982).

a threshold matter, the person seeking to withhold evidence must show that he or she "falls within the class of persons qualifying for the privilege."[160] In a privilege case arising from a criminal action and involving subpoenaed nonconfidential material, *Denk v. Iowa District Court*,[161] the court used basically the same standard while noting that it might be easier for a party seeking the information to show need in a criminal, as opposed to civil, matter.[162]

Wisconsin's Supreme Court, in two post-*Branzburg* decisions involving confidential sources and criminal cases, at first did not clearly delineate how it expected lower courts to balance the competing interests of journalists and criminal defendants. In *Zelenka v. State*,[163] the court said only that the interests of journalists and defendants should be balanced. However, the court added that in the instant case, it was clear that the journalist's information was irrelevant to the issue at hand.[164] In *State ex. rel. Green Bay Newspaper Co. v. Circuit Court*,[165] the court adopted a slightly more detailed test and outlined the procedure for determining whether the privilege should be overcome. First, the state supreme court said a trial court must determine if the person seeking to withhold information is entitled to claim the privilege. Second, the defendant in the criminal case must show that the information sought is relevant, competent, material, and favorable to his or her defense. Next, the defendant must show that he or she has exhausted possible alternative sources of the information. If the defendant has persuaded the judge that the information is relevant and unavailable elsewhere, the court said, then the judge

---

[160] *Id.* at 309.

[161] 20 Media L. Rep. 1454 (BNA) (Iowa 1992).

[162] *Id.* at 1455 (Iowa 1992).

[163] 266 N.W.2d 279, 287 (Wisc. 1978).

[164] *Id.* at 287.

[165] 335 N.W.2d 367 (Wisc. 1983).

must examine the evidence *in camera*. The judge must determine that the evidence is necessary to the defense -- that it tends to support the theory that the defendant intends to assert at trial -- before releasing it.[166]

Both *Zelenka* and *Green Bay Newspaper Co.* involved confidential sources and criminal cases. In a civil suit involving nonconfidential material, the Wisconsin Court of Appeals adopted a different test but determined that confidentiality or nonconfidentiality did not matter. In *Kurzynski v. Spaeth*,[167] the Court of Appeals adopted the test used by the Ninth Circuit of the U.S. Courts of Appeals in *Shoen v. Shoen*.[168] The test requires that civil litigants seeking journalists' information must show that they have exhausted alternative sources, that the information is not duplicative of material already obtained, and that the information is clearly relevant.[169]

West Virginia, which has only recognized a privilege for nonconfidential information, also has adopted different tests for civil and criminal cases. In a civil case, the Supreme Court of Appeals adopted the Stewart three-part test, requiring a party seeking to overcome the privilege to prove compelling need, relevance and materiality, and the lack of alternative sources.[170] In a criminal case, the court modified the requirements, requiring a defendant to show "with particularity" that the information subpoenaed is highly material and relevant to an articulated theory of his or her defense; that the information is necessary to the theory of defense; and that it

---

[166]*Id.* at 372-374. *See also* State v. Sievertsen, 18 Media L. Rep. 2175 (Wisc. Cir. Ct. 1991) (defendant failed to meet Green Bay Newspaper Co. test because he did not show that alternative sources had been exhausted).

[167]538 N.W.2d 554 (Wisc. Ct. App. 1995).

[168]48 F.3d 412 (9th Cir. 1995).

[169]Kurzynski v. Spaeth, 538 N.W.2d 554, 559-560 (Wisc. Ct. App. 1995) (*citing* Shoen v. Shoen, *id.* at 416).

[170]State ex. rel. Hudok v. Henry, 389 S.E.2d 188, 193 (W.Va. 1989).

is not available elsewhere.[171] If the defendant can make the three-part showing, the court said, the materials requested must be submitted to a judge for *in camera* review, and only those materials actually relevant to the defendant's case may be released to the defendant and the state.[172]

In Texas, where appellate courts have recognized a privilege for both confidential and, at least until recently, nonconfidential material in civil cases, the test differs depending on whether the journalist is a party. In a libel case, a Texas Court of Appeals said a libel plaintiff must show substantial evidence that the confidential source's quoted statements are false and defamatory; that no other reasonable means of identifying the source are available; and that knowledge of the source's identity is necessary or critical to the case.[173] In an earlier civil case in which the journalists subpoenaed to provide nonconfidential information were not parties, however, the appellate court stated the test as being one of relevancy, compelling need, and lack of alternative sources.[174]

Conclusion

In the federal appellate courts, journalists seeking to protect nonconfidential information from forced disclosure have found support in the Second, Third, and Ninth Circuits and in the Fourth Circuit in civil cases only. Only the Fifth Circuit has unequivocally rejected a privilege for nonconfidential information, although it has not confronted the issue in the context of an underlying civil suit. Other circuits have not clearly ruled on the issue. The Second, Third, and Ninth Circuits appear to agree that the burden a party must bear in overcoming the presumption of a journalist's privilege is lighter if the information is nonconfidential.

---

[171]State ex. rel. Charleston Mail v. Ranson, 488 S.E.2d 5, 12 (W.Va. 1997).

[172]*Id.* at 13.

[173]Dallas Morning News Co. v. Garcia, 822 S.W.2d 675, 680 (Tex. App. 1991).

[174]Channel Two Television Co. v. Dickerson, 725 S.W.2d 470, 472 (Tex. App. 1987).

In the states with shield laws, about two-thirds of the statutes in thirty-one states and the District of Columbia are written broadly enough to include unpublished, nonconfidential information in their protections. Although New York, in its statute, and California, by court ruling, have found that nonconfidential information gets less protection from disclosure than confidential material, most states do not specify that nonconfidential information be treated differently.

In the states without shield laws, as this study has shown, only Iowa and West Virginia have high-court rulings backing a privilege for nonconfidential information in both criminal and civil cases. Wisconsin has an appellate ruling supporting such a privilege in a civil case. In Texas, appellate courts until fairly recently seemed to support a privilege for nonconfidential information in civil suits, but that support appears to be slipping, if not gone. In criminal cases, Texas courts have made it clear that there is no privilege for either confidential or nonconfidential information in criminal cases. Five states – Idaho, Maine, Massachusetts, Missouri, and Washington – have limited their privileges to confidential information. High or appellate courts in the other ten states without shield laws have not considered the issue, and three of them have no court rulings on any type of privilege at the appeals level.

To the extent that privileges for confidential or nonconfidential information exist, there also is no clear consensus among the states about the basis for the privilege. Massachusetts and Washington have allowed common-law development to determine if and when privileges will be recognized. Most other states cite a combination of federal and state constitutional interests in recognizing privileges.

The findings of this study that only two of the nineteen states without shield laws support a privilege for nonconfidential information at the high-court level begs the question of whether

journalists would be better off with shield laws in all states. There are pragmatic reasons to think that they would be. For example, it should be noted that Texas appellate courts appeared to support a privilege for nonconfidential information in civil cases until recently. Although a shield law can always be amended or even taken off the books, it may be a more trustworthy and stable source of protection for journalists than periodic court rulings that can be affected by changing judicial attitudes toward the press. This may be especially true now, when at least one media law expert has suggested that courts, sensing public disillusionment with press performance, have begun to weary of protecting journalists who they believe use their free-press rights to dig up scandal and sensationalism.[175]

Also, the passage of shield laws in all or most of the states without such statutes now could help the media make a stronger case for uniform recognition of a federal privilege through a favorable U.S. Supreme Court ruling. A few years ago, the Supreme Court endorsed the recognition of a federal privilege for psychotherapists after finding it persuasive that all fifty states had statutory protection for the psychotherapist-patient relationship.[176]

Still, it may be better to let sleeping dogs lie. Courts in sixteen of the nineteen states without shield laws have either specifically or tacitly recognized a qualified privilege for confidential information in at least some proceedings. While the Reporters Committee for Freedom of the Press has noted that the vast majority of subpoenas seek nonconfidential information, and journalists often have argued that subpoenas in any form infringe on important First Amendment rights, there is no evidence that journalists treasure protections for nonconfidential information to the same extent that they do protections for confidences.

---

[175] *See* BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER (1999).

[176] *See* Jaffe v. Redmond, 518 U.S. 1 (1996).

Journalists may prefer to keep the protections they have for confidential sources and hope for better days for the nonconfidential-information privilege rather than risk legislative tinkering with the privilege.

The discussion above about journalists' attitudes raises another question: just what do journalists consider nonconfidential? Also, what effect, if any, does the existence or lack of a privilege in a state or in a federal circuit have on journalist-source relationships? It might be time to find out through empirical research. The results of such research could help arm journalists with facts that they could use to persuade legislators to adopt a shield law, or judges to recognize a common-law or constitutional privilege in the states without shield laws. Of course, the research also could find that privileges do not have any appreciable effect on journalists or what they tell us. Either way, it would be better to know the value of privileges before the next news anchor or newspaper reporter is faced with the decision whether to testify or risk jail.